TERRITORIAL SEA EXTENSION

HEARING

BEFORE THE

SUBCOMMITTEE ON OCEANOGRAPHY
AND GREAT LAKES

OF THE

COMMITTEE ON
MERCHANT MARINE AND FISHERIES
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

EXAMINATION OF THE PRESIDENT'S PROCLAMATION EXTENDING THE TERRITORIAL SEA OF THE UNITED STATES FROM 3- TO 12-MILES

MARCH 21, 1989

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PRESIDENTIAL PROCLAMATION EXTENDING THE UNITED STATES TERRITORIAL SEA

TUESDAY, MARCH 21, 1989

House of Representatives,
Subcommittee on Oceanography and Great Lakes,
Committee on Merchant Marine and Fisheries,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:08 p.m., in Room 1334, Longworth House Office Building, the Hon. Dennis M. Hertel (chairman of the subcommittee) presiding.

Members present: Representatives Hertel, Lowey, Hughes, Brennan, Pallone, Shumway, Saxton, Saiki, Herger, and Goss.

Staff present: Ray O'Malley, Brian O'Malley, Bill Ashworth, Larry Flick, Lisa Pittman, Joan Bondareff, Charles Moore, Dan Ashe, and Tom Kitsos.

OPENING STATEMENT OF HON. DENNIS M. HERTEL, A U.S. REPRESENTATIVE FROM MICHIGAN, AND CHAIRMAN, SUBCOMMITTEE ON OCEANOGRAPHY AND GREAT LAKES

Mr. Hertel. Good afternoon. I will call the hearing to order.

The Subcommittee on Oceanography and Great Lakes, will be examining the President's Proclamation of a 12-mile territorial sea for the United States.

On December 27, 1988, President Reagan issued Proclamation Number 5928, extending the territorial sea of the United States from 3 to 12 nautical miles.

The territorial sea is a maritime zone adjacent to the coast over which the United States exercises sovereignty and jurisdiction, including its airspace, seabed and subsoil.

The President declared that, consistent with international law, the U.S. will grant the ships of all countries the right of innocent passage through the territorial sea and transit passage through any international straits.

The President stated that the reason for the Proclamation was to advance the national security interest of the United States and to keep Soviet intelligence-gathering vessels nine miles further from the U.S. shoreline.

The assertion of a 12-mile territorial sea is consistent with the growing practice of other nations. Some 104 nations now claim a 12-mile territorial sea.

During the 100th Congress, the Merchant Marine and Fisheries Committee considered whether Congress should participate in the extension of the territorial sea by passing companion legislation.

The committee reported out, and the House passed H.R. 5069, but the Senate did not act on the bill.

The Proclamation itself provides that nothing in the Proclamation extends or otherwise alters existing Federal or State law.

The President's intent was to extend the territorial sea for international and national security purposes only, but not to change any State or Federal authority. Therefore, on its face, the Proclamation claims to have no legal effect on domestic law. Nonetheless, as the Justice Department legal opinion acknowledges, the question is not entirely free from doubt.

Altogether there are as many as 65 Federal laws which use the phrase "territorial sea" as providing a limit to U.S. jurisdiction. My colleague, Mr. Shumway, has introduced legislation that will codify that Proclamation.

Today's hearing will address the effect of the Presidential Proclamation, its effect on existing Federal and State law, and what action Congress may need to take.

Mr. HERTEL. See, I have read my opening statement quickly, as an example to our witnesses today since we have so many. We are going to try to move along so that everybody is heard, but that will mean that we would like you to limit yourself to five minutes of oral testimony.

All of your statements of course will be allowed into the record. I am telling you in advance, so that you can consider who might have the committee's fullest attention by even talking less than five minutes.

But first, the Ranking Member, Mr. Shumway, will be recognized for an opening statement.

OPENING STATEMENT OF HON. NORMAN D. SHUMWAY, A U.S. REPRESENTATIVE FROM CALIFORNIA

Mr. SHUMWAY. Thank you, Mr. Chairman, and I appreciate your convening this hearing this afternoon on H.R. 1405, a bill which would affirm the presidential Proclamation extending the territorial sea.

That bill also makes clear, legislatively, that the Proclamation was not intended to have any effect on domestic law.

The purpose of the President's Proclamation last December was for international purposes only, and was consistent therefore with international law. It was not, simply stated, intended to have any effect on the Submerged Lands Act which gives States ownership of resources out to 3 miles, or for that matter, on the Coastal Zone Management Act, or any other Federal or State statute.

I am aware that some coastal States believe that this Proclamation gives them an opportunity to increase their coastal zone out to 12 miles, and I am also aware that California has already issued a legal opinion to that effect.

I believe these legal arguments by coastal States are invalid, and, further, I think in the context of this Proclamation, the debate over these State issues is inappropriate.

If coastal States indeed have reason to believe that their jurisdiction should be extended under the CZMA, the Submerged Lands Act, or any other law, then that issue should be debated within the context of oversight, or reauthorization of each of these laws on a case by case basis.

There simply is no connection between the foreign policy basis for the President's Proclamation and the domestic Federal-State management issues which coastal States are raising.

Moreover, I am baffled by the testimony of some of the coastal States with respect to this bill, H.R. 1405. I have seen statements to the effect that the bill would foreclose future changes in the present Federal-State coastal relationship.

Those who say this I think simply have not read the bill. Section 2, paragraph two of the bill plainly states that "possible extension of the legal rights and interests of the States of the United States, and the Federal agencies, in the area beyond the previous 3 nautical mile territorial sea merits separate and careful consideration."

The point of the legislation is to prevent costly and needless litigation, and allow Congress to move forward and work its will on these; and other issues as we do, and I hope therefore that we will have our chance to take action on the bill following the hearing today.

Thank you, Mr. Chairman. Oh, and one other thing. I ask unanimous consent that the statement of Bob Davis be introduced in the record.

Mr. Hertel. Without objection.

[The statement of Mr. Davis follows:]

Statement of Hon. Robert W. Davis, a U.S. Representative from Michigan

I believe I can speak on this topic in a disinterested way, as the Great Lakes are not affected by President Reagan's Proclamation. The national security reasons for extending our Nation's territorial sea are compelling; this appears to be an action we might have taken even earlier.

The controversy that the Proclamation has raised stems from a possible adjustment of authority between Federal and state interests. The President's Proclamation did specify that it was not to affect domestic law. I am supportive of Congressman Shumway's bill because it confirms this intention. It appears as though we may need to send this signal, as the Federal Aviation Administration has recently released regulations which extend some of its authority out to the new 12-mile limit.

Of course, this does not mean that adjustments cannot be made in the future. I believe that changes in existing law should be made in an orderly and thoughtful manner. Congress will be one to examine its statutes and to consider the policy ramifications of any changes.

In closing, we should view the extension of America's territorial sea as an exciting opportunity. I look forward to hearing from our witnesses and working with them as the Congress begins its work at examining the dozens of laws which could be adjusted.

Mr. Hertel. Any other opening statements from committee members? Yes.

OPENING STATEMENT OF HON. WALLY HERGER, A U.S. REPRESENTATIVE FROM CALIFORNIA

Mr. Herger. Thank you, Mr. Chairman. Early last summer, we were informed that the Administration was planning to extend the territorial sea from 3 to 12 miles for international purposes only.

As a former member of the California State legislature, and thus familiar somewhat with California's Coastal Commission, I was concerned that the Coastal Commission would use this decision to attempt to extend the limit for domestic purposes as well.

I therefore was not surprised when I heard yesterday that the California Coastal Commission had indeed announced that the President's statement automatically gave them veto power over any development up to 12 miles off the California coast.

Mr. Shumway's bill, H.R. 1405 would address this concern. It affirms the Administration's decision to extend the sea for international purposes only. It then would give Congress the time to review each applicable law, and decide whether current language should be expanded.

This legislation would prevent the chaos that could rapidly develop without congressional mandated limits on the extension, and I urge my colleagues to support Congressman Shumway's H.R. 1405. Thank you.

Mr. Hertel. Thank you, Mr. Herger. Now we will start with the first panel, Mr. Brian Hoyle, Director, Office of Oceans Law and Policy at the State Department; Rear Admiral Joseph Vorbach, Chief Counsel, United States Coast Guard; Mr. Michael Poling, Deputy Assistant Secretary for Land and Minerals Management, Department of Interior; Mr. Timothy R. E. Keeney, General Counsel, National Oceanic and Atmospheric Administration.

The Members are familiar with the lighting system up there. In many committees we have a 5-minute rule, although this committee does not operate under that on a regular basis. The witnesses will have that wonderful opportunity to watch the colored lights.

Mr. Hoyle.

STATEMENTS OF A PANEL, CONSISTING OF BRIAN HOYLE, DIRECTOR, OFFICE OF OCEANS LAW AND POLICY, UNITED STATES STATE DEPARTMENT; REAR ADMIRAL JOSEPH VORBACH, CHIEF COUNSEL, UNITED STATES COAST GUARD; MICHAEL POLING, DEPUTY ASSISTANT SECRETARY FOR LAND AND MINERALS MANAGEMENT, UNITED STATES DEPARTMENT OF THE INTERIOR; AND TIMOTHY R.E. KEENEY, GENERAL COUNSEL, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

Mr. Hoyle. Thank you, Mr. Chairman. I appreciate the need to be brief and I will quickly summarize my testimony to try to leave as much time as possible for questioning.

As the Chairman said, on December 27th of last year, President Reagan proclaimed an extension of the United States territorial sea from 3 to 12 miles.

I respectfully request, Mr. Chairman, that a copy of the presidential Proclamation be included in the record. Thank you.

Last year, during the 100th Congress, the subcommittee, and indeed, the full Merchant Marine Committee, and the Administration worked together, I think very well, in trying to craft a bill that would be of benefit to the United States.

Unfortunately, while the House passed that bill, time ran out before the Senate could act.

Mr. Chairman, members of the committee, from the time of President Washington to the present—to December 27th of last year, that is, the United States had claimed only a 3-mile nautical mile territorial sea.

But by last year, it was clear that national security and the practice of most nations made it desirable to change this policy. In examining the Proclamation, the Proclamation affects the breadth of the territorial sea only for international purposes.

We worked very hard not to change the existing balance between the Federal Government and States in a relationship that has built up over the last 200 years. The Department of Justice rendered an opinion which we believe supports extension of the territorial sea for international purposes, while not changing the existing balance between the States and the Federal Government.

We felt it important not to deprive this country of the international benefits of extension simply because we are a Nation with a Federal system. Thus, the Proclamation does not increase or diminish any rights or interests of any State of the United States under existing statutes that apply to the territorial sea.

Nothing in the Proclamation extends the geographic application of any such statute beyond 3 nautical miles from the baselines from which the territorial sea of the United States is measured.

The President's action is fully consistent with international law as reflected in the 1982 United Nations convention on the law of the sea.

Under international law, the United States is entitled to exercise sovereignty over a territorial sea of not more than 12 nautical miles. The Proclamation makes it clear that the United States will continue to fulfill its obligation to accord other nations the rights of innocent passage and of straits transit passage through straits to which those nations are entitled under international law.

By carefully observing and articulating these rights and obligations, the United States can guide the conduct of other countries in the implementation of territorial sea rights and duties, to foster consistency and advantage with progressive development of international law.

In issuing the Proclamation, the President acted within his constitutional authority and responsibility to conduct foreign affairs, and to ensure the national security of the United States.

Foreign nations are no longer able to station intelligence-gathering vessels in the 3- to 12-mile band of water which had been beyond our territorial sea.

Within 24 hours of the issuance of the Proclamation, a Soviet electronic intelligence-gathering vessel was requested to depart the extended territorial sea and did so immediately.

At present, we are continuing to examine the possibility of extending the contiguous zone of the United States to 24 nautical miles.

Mr. Chairman, and members of the committee, you will recall that last year we were considering extension of the contiguous zone.

An issue arose late in this consideration as to whether the fact that the United States continues to be a party to the 1958 Geneva Convention on the territorial sea and contiguous zone would preclude us from extending the contiguous zone.

That convention limits the breadth of the contiguous zone to 12 nautical miles from the baseline from which the territorial sea is measured. That would be nine miles, and we had a nine mile contiguous zone beyond our territorial sea before.

Mr. Chairman, the Department of State is studying the international legal implications of this. We are satisfied that we could do so under international law. There is some constitutional question which the Department of Justice will look into when we have completed our analysis.

Mr. Chairman, that concludes my summary. I thank you very much, and members of the committee. We look forward to working with you in the coming months on the implementation of the territorial sea. Thank you.

[The statement of Mr. Hoyle can be found at the end of the hearing.]

Mr. **Hertel**. Thank you, Mr. Hoyle. Admiral.

STATEMENT OF ADMIRAL VORBACH

Admiral **Vorbach**. Thank you, Mr. Chairman, members of the committee. Pursuant to your request, I will make a brief oral statement and ask that my entire statement be submitted for the record.

Last year, I testified before this subcommittee concerning H.R. 5069, a bill to extend the territorial sea and contiguous zone, and at that time I testified that the Coast Guard supported extension of the territorial sea.

Subsequently, President Reagan's Proclamation of December 27th, 1988 extended the territorial sea of the United States from 3 to 12 nautical miles.

The Proclamation was intended to extend the territorial sea only for international purposes. The Proclamation did not alter existing State or Federal law. Thus, the Proclamation was not meant to change the 3 nautical mile line previously identified as the territorial sea for the purposes of domestic law.

Accordingly, nothing in the Proclamation extended the geographic application of any statutes beyond 3 nautical miles from the baselines which the territorial sea of the United States is measured.

The Coast Guard is involved with and responsible for a myriad of ocean-related activities which take place in the territorial sea. Title 14 of the United States Code assigns to the Coast Guard primary duties for administering laws and promulgating and enforcing regulations in the maritime arena for, among others, matters involving maritime safety and navigation, smuggling, and the protection of the marine environment.

Numerous jurisdictional terms used in domestic law have traditionally been applied out to the limit of the territorial sea of the United States.

Since many of these terms are not specifically defined by statutes, agencies have interpreted these terms by regulation. Some of the terms used but not defined in statutes include "navigable waters," "territorial waters," "waters subject to the jurisdiction of the United States," and "waters over which the United States has jurisdiction."

The Coast Guard has generally defined the outer limits of the area described by these terms to be the same as the outer limit of the territorial sea, historically, 3 nautical miles from the baselines from which the breadth of the territorial sea is measured.

In view of the Proclamation's statement that existing Federal or State law was not extended, or altered, the Coast Guard's statutory authorities have not been changed by the Proclamation.

Accordingly, the definitions and application of jurisdictional terms relied on by the Coast Guard to carry out its missions, which have traditionally been applied to the previous territorial sea limit of 3 nautical miles have not changed.

It may be in the interest of the Coast Guard that certain laws be amended to conform domestic law to the Proclamation. Such legislation would have substantial and significant impact on the operations, regulatory authority, and resources of the Coast Guard depending on the specific application of the legislation on each of the laws which the Coast Guard enforces.

The Coast Guard is in the process of analyzing applicable laws to determine whether the geographic application of some laws should be extended, and whether additional resources, both in personnel and hardware, would be required to implement an extension of authority in a given area.

Two examples of possible changes are: In our waterways safety regulatory authority, and our regulatory authority to define and establish anchorage grounds—if they were extended, we would generally be able to require vessels to use a traffic separation scheme, anchor, or operate in a specific manner out to 12 nautical miles, where we are presently limited to 3 nautical miles.

In the area of our shipping laws, penalties for operating a foreign vessel in a negligent manner would be applicable out to 12 nautical miles if certain provisions were amended to conform with the Proclamation.

One area needing an amendment to clarify the Coast Guard's authority is the protection of United States' ports from threats to the security of the United States, pursuant to 50 U.S.C. 191.

The Proclamation has provided enhanced authority for United States' forces to take the necessary steps to restrict foreign surveillance and other activities which are prejudicial to the security of the United States to areas outside 12 nautical miles from the United States' coasts.

The Coast Guard has instituted appropriate measures to take advantage of this enhancement of national security; however, the Coast Guard's ability to enforce domestic law, to control foreign vessels between 3 and 12 nautical miles would be enhanced if the port security enforcement authority, and the attendant sanctions, were extended out to 12 nautical miles.

The applicability of 50 U.S.C. 191 with regard to foreign-flag, as well as U.S. flag vessels, is limited, by definition, to the territorial waters of the United States.

The extension of this authority to 12 miles will significantly enhance the ability of the Coast Guard to protect the United States from threats to its security from foreign sources.

That concludes my oral statement. I appreciate the opportunity to present these views for your consideration, and will undertake to answer any questions you might have.

[The statement of Admiral Vorbach can be found at the end of the hearing.]

Mr. **Hertel**. Thank you, Admiral. Mr. Poling.

STATEMENT OF MR. POLING

Mr. **Poling**. Thank you, Mr. Chairman. I have a brief statement that I would like to submit for the record, and with your permission I will summarize my testimony, and respond to any questions that you might have.

During the last session of Congress, Mr. Chairman, I testified on behalf of the Department on H.R. 5069 and indicated the Department's support for extending the territorial sea from 3 to 12 nautical miles for international purposes.

Subsequently, this extension was implemented by the Presidential Proclamation. While the Proclamation applies to the 50 States of the Union as well as to the Commonwealth of Puerto Rico, American Samoa, the U.S. Virgin Islands, the Commonwealth of the Northern Mariana Islands, and all other United States territories and possessions, the Proclamation made clear that it does not change the application of U.S. domestic statutes.

To further assure this point, however, the Department would support appropriate legislation clarifying that existing statutes remain unaffected.

As you are aware, Mr. Chairman, the Department of the Interior manages the offshore oil and gas program under the Outer Continental Shelf Lands Act, while the States manage the development of minerals off their coasts under the Submerged Lands Act.

Both of these statutes define "jurisdiction" in terms of geographical miles and marine leagues. Our reading of these statutes indicate that the terms, "boundaries" and "land beneath navigable waters," are not extended from the coast line more than 3 geographical miles in the Atlantic or Pacific Oceans, or more than 3 marine leagues into certain areas of the Gulf of Mexico.

The offshore oil and gas program that the Department administers is also affected by the Coastal Zone Management Act which is primarily implemented by the Department of Commerce.

Our understanding is that the breadth of the coastal zone was not affected by the Presidential Proclamation. If, however, this is not the case, the Department would be concerned about potential new conflicts related to leasing, exploration and production of minerals on the Outer Continental Shelf.

The area encompassed by the territorial sea accounts for 122 million barrels of oil, and over a trillion cubic feet of natural gas, which is about one-third of OCS oil production, and one-fourth of OCS gas production.

In 1987, this area accounted for about $800 million in direct Federal revenues.

Finally, Mr. Chairman, the Department is currently reviewing the effect of the Proclamation on other activities within the Department. I would be pleased to respond to any questions.

[The statement of Mr. Poling can be found at the end of the hearing.]

Mr. **Hertel.** Thank you, Mr. Poling. Mr. Keeney.

STATEMENT OF MR. KEENEY

Mr. **Keeney.** Mr. Chairman, and Members of the subcommittee, I appreciate the opportunity to present testimony concerning Presidential Proclamation 5928 and its effect on the programs and authorities administered by the Department of Commerce.

The Proclamation extended the United States' territorial sea from 3 to 12 miles for national security and international reasons.

The Department of Commerce has recognized the need for such an extension and its appropriateness under international law. At the same time, the National Oceanic and Atmospheric Administration (NOAA) has been aware of the potential confusion relating to the impacts on domestic law which might result from such a Proclamation.

The Proclamation itself specifically addresses this matter, stating that it does not extend or alter existing Federal or State law, or any derivative jurisdiction, rights, legal interests or obligations.

This statement makes it clear that changes to domestic statutes, as a result of the Proclamation, were not intended. In the opinion of the Department of Justice, the precise effect on the domestic legislation depends on an analysis of each particular statute.

In order to allow for orderly implementation of the Proclamation in domestic law, NOAA, in previous testimony before this subcommittee, expressed support for legislation to clarify that existing statutes were not affected. NOAA would still support appropriate clarifying legislation.

The only immediate effect of the Proclamation on NOAA programs is in the area of nautical charting. In coordination with the interagency Baseline Committee, NOAA is planning revisions to new nautical chart editions to include the 12-mile territorial sea.

On some larger-scale maps, adjustments may be necessary in order to depict the 12-mile line. These revisions would be included as part of the regular cycle of chart revision and reissuance, and will not be completed for several years.

NOAA has also examined its statutory authorities to determine whether any of these authorities rely on, or are otherwise linked to the extent of the U.S. territorial sea under international law.

Jurisdiction under most of the statutes implemented by NOAA does not depend on the territorial sea. These generally include NOAA's research authorities, weather and climate program authorities, and coastal and geodetic survey authorities.

In addition, some resource-related statutes are not directly dependent on the territorial sea concept; however, certain aspects of their jurisdiction or enforcement might be affected.

These statutes include the Deep Seabed Hard Mineral Resource Act, the Marine Mammal Protection Act, the Endangered Species Act, and the Marine Protection, Research and Sanctuaries Act.

NOAA agrees with the Department of the Interior that the Proclamation does not affect the jurisdictional provisions of the Submerged Lands Act. Jurisdiction under this statute is not dependent upon the extent of the U.S. territorial sea. NOAA's jurisdiction under statutes whose jurisdictional reach is determined with reference to the provisions of the Submerged Lands Act would also be unaffected.

One such statute is the Magnuson Fishery Conservation and Management Act, which basically provides jurisdiction for management of fishery resources in the Exclusive Economic Zone (EEZ) of the United States.

The Magnuson Act specifically defines the inner boundary of the EEZ, for Magnuson Act purposes, as a line "coterminous with the seaward boundary of each of the coastal States."

The legislative history of this provision indicates the clear intention that the phrase "seaward boundary" have the same meaning as that phrase in the Submerged Lands Act.

Since the inception of management under the Act, NOAA has consistently considered the Magnuson Act's EEZ inner boundary as the same as that established by the Submerged Lands Act.

Similarly, governing international fisheries agreements which are now in effect to govern foreign fishing within the boundaries of the EEZ, as so defined, are not modified by the Proclamation.

Finally, the Coastal Zone Management Act is the only major NOAA statute which defines a basic jurisdictional boundary—the coastal zone—in terms of the U.S. territorial sea.

Both NOAA and the Department of Justice have carefully considered whether the term "territorial sea," as used in the Coastal Zone Management Act is so linked to the international concept of the territorial sea as to warrant the construction that the coastal zone is extended to 12 miles.

NOAA agrees with the conclusion of the Department of Justice that the better view is Congress did not intend that the coastal zone automatically extend to the full extent of the U.S. territorial sea under international law.

In view of this conclusion, and considering both the clear intent of the Proclamation and the prerogatives of Congress, particularly in the areas of establishing State boundaries and the disposition of territory of the United States, the term "coastal zone" should be construed as limited to the 3-mile line unless subsequently modified by Congress.

There are, of course, other provisions of statutes administered by NOAA which have not been mentioned in this discussion of basic jurisdiction. NOAA is continuing to examine the discrete provisions, particularly those relating to Federal enforcement authority.

It is possible that some revisions, such as that in the Marine Sanctuaries Act, which essentially prohibits applications of sanctuary regulations to foreign nationals, "unless in accordance with the recognized principles of international law," would operate to extend enforcement and other authority under the Act.

NOAA, in consultation with the Coast Guard and other appropriate agencies, will continue to consider these provisions and will inform Congress if statutory changes are necessary.

Mr. Chairman, that completes my prepared statement. I would be happy to answer any questions you may have.

Mr. HERTEL. Thank you. I know you are all, from testimony now and in the past, in favor of the 12-mile limit. Do you all support

Mr. Shumway's bill, which would codify that, or, do you see other ways of the Congress implementing the 12-mile limitation either by separate pieces of legislation being amended, or any other areas? But really, I am asking, do you support Congressman Shumway's legislation?

Mr. **Keeney**. Mr. Chairman, I can say the Administration is reviewing the bill and has not yet formulated a position.

Mr. **Poling**. I can say, Mr. Chairman, on behalf of the Department of the Interior, that as I mentioned in my testimony, we would support legislation similar to the bill introduced by Mr. Shumway, so long as it makes clear that the domestic statutes are not affected by the extension of the territorial sea.

Admiral **Vorbach**. We have similarly reviewed the legislative proposal and are clearing our position through the Administration. One suggestion might be to make clear that in all future enactments, a definition of the "territorial sea" would be understood to mean 12 nautical miles, but note that no other existing legislation is modified by this.

Mr. **Hoyle**. Mr. Chairman, from the Department of State's perspective, the recommendations that went forward to the President last year from the Senior Interagency Group recommended support in this Congress for legislation of the type introduced by Mr. Shumway.

Subject to reserving our position on the precise language, I believe the langauge was taken from a proposal of the Department of Justice last year. We may have some maturation of thought—at least I would hope we do since then—but I think it is important that a bill of the type of Mr. Shumway's be enacted to try to—you might say—have a statement from a co-equal branch of Government to the effect that the existing State-Federal relationships are not changed until they can be looked at by the Congress and the Administration together, on a case by case basis.

I think we are all afraid that interest will go to the third equal branch of Government to try to challenge what we accomplished in the Proclamation and what the Congress almost accomplished last year. Thank you.

Mr. **Hertel**. Now that is what the Chair sees as the chief need for Mr. Shumway's legislation, to make it clear to all so we have less litigation, and have consistency.

Let me ask you about one question, though. Admiral, do you see any problem with gaps in criminal jurisdiction if the States are limited to 3 miles, and then we go to 12, but since the Federal criminal statutes, as one example, do not speak to every incident—some are covered by State laws—would that be a problem of—well, not having all possible violations covered?

Admiral **Vorbach**. Well, we presently have jurisdiction in the Coast Guard under 14 U.S.C. 89 over all Federal offenses on the high seas in waters subject to the jurisdiction of the United States.

As this review proceeds, and we identify statutes that need to be extended out to 12 miles, our jurisdiction to enforce those statues will be provided for.

I do not envision any gaps in any of that jurisdiction.

Mr. **Hertel**. And Mr. Poling, do you see any difference on how this would affect some of the territories versus the 50 States?

Mr. POLING. None that I am aware of, Mr. Chairman, but to be absolutely sure, I would be glad to examine that further and respond in writing.

Mr. HERTEL. Thank you.

[The information of Mr. Poling follows.]

There is no effect. The U.S. territorial sea surrounds those areas over which the United States exercises sovereignty. Therefore, besides the 50 States, the territorial sea surrounds all territories, commonwealths, and possessions, including, but not limited to, Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Northern Mariana Islands. U.S. sovereignty, however, does not extend to the Federated States of Micronesia and the Marshall Islands which are in free association with the United States, or to the Trust Territory of the Pacific Island (Palau); therefore, the territorial sea does not surround these island areas.

Mr. HERTEL. Mr. Shumway.

Mr. SHUMWAY. Thank you, Mr. Chairman.

I love the enthusiasm with which you all responded to the Chairman's question, Do you support this bill?

Mr. HERTEL. That just goes to show you, you should never assume. When I asked the question, I just assumed.

[Laughter.]

Mr. SHUMWAY. Well, I do hope, after you have examined the language, that we will have your support forthcoming. I think everyone, at least at the table now, agrees that we need some kind of clarifying legislation.

This language is language which we have had before, and if it can be improved upon, we would certainly like to know it, but I think the general intent is there, and should be one supported by the Administration.

I would like to follow up and ask if any of you believe that this legislation, if it were enacted, as it now stands, would it prevent a review of statutes on a case by case basis, to determine if future domestic changes should be made? It is a leading question, but if you would like to answer. Any of you.

Mr. HOYLE. Not at all, Mr. Chairman. In fact it might be helpful in having orderly case by case review, because by clarifying the relationship of the Proclamation, the legislation, and existing statutory authorities, it would take some of the pressure off for hasty action, and possibly some of the political horse race that might result from trying to fix statutes quickly to get a leg up. Thank you.

Mr. SHUMWAY. Thank you.

Admiral VORBACH. I concur with Mr. Hoyle's comment, Mr. Shumway. I think that having this legislation would quiet litigation and enable the review to occur in a more orderly fashion. We have over 170 statutes that we are looking at to determine what is appropriate for extension, and what is not.

Mr. SHUMWAY. Thank you. Just one more question. Last year, a bill passed the House which preserved the status quo with regard to domestic law, but also set up a Territorial Sea Commission. Do you support such a commission? Any of you.

Mr. HOYLE. Mr. Chairman, I do not know that this Administration has had an opportunity to reflect on that specifically, but it certainly was the consensus of the Senior Interagency Group last year, that such a commission would be duplicative of existing bodies, both in the Congress and in the Administration.

It may be my personal view, as director of an Office of Ocean Law and Policy. I do not particularly want to see the responsibilities of my office delegated to a body which does not have the normal Executive Branch or congressional oversight. It has been my experience, over the years, that the House Merchant Marine and Fisheries Committee staff, and Administration staff, have a vast expertise, and there are a lot of interagency and intergovernmental consultative organizations already in existence which need not be duplicated by the creation of a committee that really does not bear direct responsibility to either the Executive or the Congress. Thank you, Mr. Chairman.

Mr. SHUMWAY. Thank you, Mr. Chairman.

Mr. HERTEL. Other questions from the committee? Mr. Saxton.

Mr. SAXTON. Thank you, Mr. Chairman. I think it is pretty obvious that we all are going to support this bill because of its—if for no other reason, the necessity of making sure that Congress continues to make policy relative to these matters rather than the courts. I think that is what would happen if we did not pass this bill.

Mr. Shumway asked a question that I thought was very interesting and that was relative to the review of other domestic statutes that may apply here, and I would just like to ask one question of Mr. Poling and Mr. Keeney.

Are there any domestic statutes that you think we should, in an expeditious manner, look at in terms of the possibility of extending to the 12-mile limit some of those statutes, and, if so, what are they?

Mr. POLING. Mr. Saxton, I do not know any, offhand. If you would like, we could respond in writing to that question. I think our review during the research, not only for this hearing, but for the hearing held last summer, disclosed that there are literally dozens of statutes that may be affected and may be——

Mr. SAXTON. I just thought maybe you had a favorite that you thought ought to be to 12 miles.

Mr. POLING. No. No personal favorites, no, but we would respond——

Mr. KEENEY. Congressman Saxton, I might just add that NOAA does not rule out the possibility that subsequent legislation, particularly regarding enforcement authority, might be warranted, but we are still reviewing that need.

Mr. SAXTON. Thank you.

Mr. HERTEL. Mr. Pallone.

Mr. PALLONE. Thank you, Mr. Chairman. I just wanted to ask this with regard to the Coastal Zone Management Act. I gather that you feel the coastal zone, pursuant to that Act, which is defined by the territorial sea, would be limited to 3 miles as well.

That is the only area where I think I could see a problem in terms of the actual language, because it does say "territorial sea" and I know that in New Jersey there has always been concern to utilize a consistency determination as much as possible.

I really do not understand how it is possible to say that the Coastal Zone Management Act does not include the full 12 miles when you look at the language. Secondly, wouldn't it make sense to extend it to 12 miles, particularly because of the various environmental concerns that are out there, that we would allow the States to have that kind of control pursuant to the consistency determination for the 12 miles.

I would prefer that, whether it be done now, or it be done by subsequent legislation.

Mr. KEENEY. I might just say that as I said in my statement, the Department of Justice and our analysis indicate that while the statute defines the seaward limit of the coastal zone as the "outer limit of the United States' territorial sea," it is the legislative history that indicates that Congress did not intend this boundary to be changed automatically, if the U.S. territorial sea were so extended.

So, we believe it is a matter of congressional intent, and even though, as the Department of Justice says, the question is not entirely without doubt, we believe the better view of that congressional intent is that it is not extended.

As to your second question, whether it would make sense to extend it to 12 miles, I think that is something that is certainly open to debate, and would require legislation if it were to——

Mr. PALLONE. I see that in the statement the California Attorney General has given to us he sees the purpose as entirely different, and the purpose justifying the 12 miles. Reading his statement it seemed to make sense, but we can ask him later why he feels strongly about that. Thank you.

Mr. HERTEL. Other questions from the committee?

[No response.]

Mr. HERTEL. We thank the panel. We might have additional questions for you in the future, and we appreciate very much your time.

Next, on the second panel, we have Mr. Peter Douglas, Executive Director, California Coastal Commission; Dr. Ernie Carl, Department of Natural Resources and Coastal Development, North Carolina; Mr. Chris Shafer, the State of Michigan, Department of Natural Resources, who is also testifying on behalf of the Coastal States Organization; Miss Suzanne Iudicello, Associate Director for Fisheries and the Environment, Alaska Governor's Office. Mr. Douglas.

STATEMENTS OF A PANEL, CONSISTING OF PETER DOUGLAS, EXECUTIVE DIRECTOR, CALIFORNIA COASTAL COMMISSION; DR. ERNIE CARL, DEPARTMENT OF NATURAL RESOURCES AND COASTAL DEVELOPMENT, NORTH CAROLINA; CHRIS SHAFER, STATE OF MICHIGAN, DEPARTMENT OF NATURAL RESOURCES (TESTIFYING ON BEHALF OF COASTAL STATES ORGANIZATION); SUZANNE IUDICELLO, ASSOCIATE DIRECTOR FOR FISHERIES AND THE ENVIRONMENT, ALASKA GOVERNOR'S OFFICE

Mr. DOUGLAS. Mr. Chairman, members of the subcommittee, thank you very much for this opportunity to testify. I am the executive director of the California Coastal Commission.

I will limit my testimony today to the effects, as we see them, of the President's Proclamation on the Coastal Commission's implementation of the Federal Coastal Zone Management Act.

The question of who owns, or should own, or who controls, for all management purposes, the natural resources in the expanded territorial sea is one for Congress, the Governors of the coastal States, and the State legislatures to address. We recognize that.

When the President issued the Proclamation, the immediate question for the Coastal Commission was how does it affect our responsibilities under the Coastal Zone Management Act? And that is the question that we then directed to the States's Attorney General for review.

The Attorney General issued an opinion and the committee has copies of that opinion. I just want to summarize the conclusions of the advice that we got from our Attorney General.

First: The Proclamation does not extend the boundaries of the State of California, for ownership purposes.

Second: The Proclamation does not extend the States' direct permit jurisdiction, that is, the Coastal Commission's permit authority.

Third: It does, however—the opinion concludes—extend from 3 miles to 12 miles, the seaward boundary of the coastal zone for purposes only of the Federal Coastal Zone Management Act, and the application of its Federal consistency review provisions.

This extension enlarges the area to which the consistency provisions of that Act apply directly, and the reason for that conclusion is that the coastal zone is defined in the Coastal Zone Management Act as being coterminous with the territorial sea.

In terms of legislative history, it is clear that at the time that the Coastal Zone Management Act was enacted, the Senate had a version of the bill that provided for a limitation to 3 miles. The House did not. The House version was adopted. I think that this is one of the major reasons the Attorney General concluded as he did.

I want to emphasize that we do not question the President's authority to take the action he did. Rather, the issue is a matter of Federal law. So, it is a question of what Congress did, and what Federal law—the Coastal Zone Management Act—means when it defines the State's coastal zone as being coterminous with the territorial sea.

Accordingly, if the Congress intended the coastal zone to expand with the territorial sea, it is a matter of Federal law and only Congress can change it.

As we read the California Attorney General's opinion, the President's Proclamation cannot, on its own, in the absence of action by Congress, limit the application of Federal law.

But what does the Proclamation mean relative to—and what does the Attorney General's opinion mean in the context of applying the CZMA? It does not mean, from our perspective, a dramatic or drastic change in the way Federal consistency provisions will be applied by coastal States.

We do not see it as significantly increasing the number of Federal activities that are reviewed by coastal States. However, it does strengthen the State's role, and the State's ability to address Federal activities that have significant impacts on the coastal zone in three major ways.

First, it could end or diminish the many disputes that now exist about whether Federal projects between the 3 and 12 miles are subject to consistency review.

Secondly, it will permit a more comprehensive review of the projects that have impacts in the coastal zone, in this 9-mile area between the 3 and 12 miles.

And thirdly, it will strengthen the ability of the coastal States to review those activities beyond the new 12 miles having impacts within the coastal zone, the 12-mile coastal zone.

It does not change the procedures of appeal in the Federal Coastal Zone Management Act at all.

Our view is that this overall result keeps faith with the Federal-State partnership that Congress established in 1972 in enacting the Coastal Zone Management Act.

As you know, that Act established, in Federal law, that effective management of coastal resources by the States is in the national interest. As such, the Federal Coastal Zone Management Act provided funding and it gave the States, for the first time, the authority to review Federal activities that have impacts on coastal resources to ensure that they are consistent with the Federally approved coastal management programs.

In conclusion, Mr. Chairman, members of the subcommittee, we want to renew our pledge to carry out our duties under the Federal Coastal Zone Management Act, and the California Coastal Act in a fair and responsible manner. We would ask you to keep faith with the agreement struck with the coastal States in 1972.

As you review the many implications of the President's Proclamation extending the territorial sea to 12 miles, we respectfully ask that you not weaken the coastal States' ability to effectively deal with the significant impacts of Federal activities on coastal zone resources through the CZMA.

For these reasons, we cannot support, at this time, Mr. Shumway's bill in its present form. Thank you for the opportunity to testify and I would be happy to answer any questions.

[The information of Mr. Douglas and the American Law Division document can be found at the end of the hearing.]

Mr. HERTEL. Dr. Carl.

STATEMENT OF DR. CARL

Dr. CARL. Thank you, Mr. Chairman. Honorable Members, ladies and gentlemen, on behalf of the State of North Carolina, I would appreciate the opportunity to comment on the expansion of the territorial limits. North Carolina has more than 300 miles of ocean front along the barrier islands, 4000 miles of estuarine shoreline, and 2.2 million acres of sounds and bays. In short, we are in the marine business. We have a very large fishery. We have a large tourist industry. We take those industries seriously, and we have a clear history of protecting those resources.

Our coastline, our barrier islands, and our marshes are in good shape. We intend to keep them that way.

President Reagan's Proclamation extending the U.S. territorial sea is consistent with international law, in our mind. It makes sense for security, but it also makes sense for natural resource protection.

However, it has raised questions between the States and the Federal Government on a number of domestic issues. States need to know exactly what new responsibilities they can assume in order to adequately protect their marine and coastal resources. There can be no gap in protection while jurisdiction is debated or challenged.

In our opinion, Congress must act to resolve the ambiguities in domestic law. In doing so, we believe that it should act in close partnership with the coastal States. For some activities, regulation by the States in the 12-mile territorial sea is the only cost-effective alternative. In others, Federal regulations would be most effective, and in some a Federal-State partnership such as exists under the Magnuson Act might be the best solution.

Each use must be assessed on its own merits, if misuse and abuse are to be prevented. A single stroke, one-size-fits-all approach is unthinkable. We have not had time to go over all these issues, but we have looked at four of them that we have a particularly strong interest in, and I would like to go over those very briefly.

Ocean pollution. I guess everybody has had problems with stuff dumped at sea washing ashore. We have. Medical wastes. We had a bout of it last summer. It is clear that 3 miles just simply is not enough for us to protect ourselves.

We managed, with the cooperation of the Navy, to get last summer's mess cleaned up, but we do not know what the future holds. We have changed our laws to make them more clear. We have, incidentally, enacted a regulation which makes it illegal to dump stuff overboard in such a way as to enter territorial seas. That has not been tested, but we are out there trying to protect ourselves as best we can.

We think that extension of States' authority in this area, and in the area of ocean dumping—we have had difficulty with ocean dumping in some isolated cases, makes sense. We have to be a partner in what happens out there to protect our resources on which we depend.

Coastal management. I guess you have heard a lot about coastal management here today. I will not go over it. We do, in looking at the history, believe that Congress specifically rejected 3 miles and adopted territorial sea. Our own State law follows that and gives our commission the regulatory power to define that limit, and we are taking action at the present time to extend to 12 miles.

Actually, it ought to be 200 miles, if you want to know. We have got to protect our resources. They are our livelihood.

Air space. Everybody knows the FAA is taking interesting actions. North Carolina is presently considering a half dozen proposals to expand military air space in our State. This has a significant effect on our economics as, more and more, the economy is dependent on air traffic.

We have to be a partner in these things, and we are a partner as long as it is Territory of North Carolina.

Marine fisheries. Here is a very complex issue in which the territorial sea affects the management strategy. We have a working relationship with the Federal Government through the Magnuson Act. We would recommend here, that that issue be put over to the

Magnuson Act reauthorization in some way. That is where the experts will gather and hammer these things out.

Those are our four most desperate concerns. What we are asking for is an ongoing dialogue, a chance to sit at the table, be part of this, and be part of the ongoing program of marine protection. Thank you, Mr. Chairman.

[The statement of Dr. Carl can be found at the end of the hearing.]

Mr. HERTEL. Chris Shafer.

STATEMENT OF MR. SHAFER

Mr. SHAFER. Thank you, Mr. Chairman. I am Chris Shafer, chairman of the Coastal States Organization which is a representative or association of 35 coastal States and territories.

I am also chief of the Great Lakes shoreline section an for the Michigan Department of Natural Resources. We appreciate the opportunity to present our views on the expansion of the territorial sea and H.R. 1405.

I should add that it is a genuine pleasure to appear before you, Mr. Chairman, as a fellow Michiganian.

We have submitted written testimony, and in the interest of time I will just summarize the key points.

I think it is important to realize that the Proclamation is just a little over three months old. We have a number of State association studies, individual States evaluating various aspects of this issue, and we hope to be able to submit additional testimony, and information and evaluation at a future date.

The recent extension of the U.S. territorial sea contained in President Reagan's Proclamation number 5928 presents fundamental legal and policy questions to the U.S. Congress.

With the Proclamation, the United States has annexed roughly 180,000 square miles of new territory, roughly the size of the State of Texas. The Nation now has full sovereignty over this tremendous area. There are strong constitutional arguments that extension of the U.S. sovereignty requires congressional, not solely Executive action to affirm and implement authority over this new area.

For this reason, and to clarify the application of existing statutes, and the role of the coastal States and territories in this area, we believe it is essential that Congress address this territorial sea expansion legislatively.

Throughout the existing Federal statutes, the term "territorial sea" is used over 70 times. Notably, only twice is it defined as a 3-mile zone. Given previous congressional attempts to expand the territorial sea, congressional awareness of the U.S. position at the Law of the Sea Conference, and the legislative history associated with the Coastal Zone Management Act of 1972, we cannot accept the premise that the term "coastal zone" is fixed to a 3-mile limit.

For these reasons, we cannot support H.R. 1405 which proposes to limit the territorial sea to 3 miles and prevent the application of existing domestic law to the new territory between 3 and 12 miles.

In our view, H.R. 1405 prematurely forecloses the question of congressional intent in all of the existing laws using the term "territorial sea" and consequently we oppose it.

With regard to States' interests, given their proximity to, reliance on, and economic impacts of use and management of the sea and coastal resources, coastal States have direct and inherent rights, interest, and expertise pertaining to the resources of the new 12-mile territorial sea.

Coastal States have substantial experience in addressing such issues as mineral exploration and mining, fisheries management and habitat protection, pollution control, historic shipwreck preservation, and dredge material disposal.

These pressing issues on coastal resources do not respect artificial boundaries such as 3 miles, and consequently, coastal States have a vital interest in expanding resource-management authority into this new area.

Now the precedent for substantially expanding coastal State jurisdiction offshore was set by Congress long ago with the Northwest Ordinance of 1787. Since entering the Union, the Great Lake States have had extensive management authority over vast areas of water and submerged lands, and the aquatic resources found there.

As you probably know, the shortest distance offshore of a State boundary in the Great Lakes region is 21 miles for the State of Pennsylvania and Lake Erie. I would refer the members of the subcommittee to figure one of our testimony for a map that helps illustrate this concept.

Michigan's jurisdiction extends as far as 72 miles to our boundary with Canada and Lake Superior, and commonly extends 40 to 50 miles offshore. Now these State boundaries extend into international waters which are heavily trafficked by commercial ocean-going vessels, and in a region containing 20 percent of the United States' population, and 60 percent of Canada's population.

The State of Michigan alone has jurisdiction over 38,500 square miles of Great Lakes' surface water area and bottom lands. The Great Lakes States have done a very effective job of managing and protecting these offshore resources in concert with Canada, and ocean coast States deserve the same opportunity.

In conclusion, in view of the historic precedents, coastal States' interest and expertise in managing offshore resources, constitutional principles and statutory provisions, the coastal States should at least be equal partners in managing these new offshore resources, if not the primary authorities in this new region.

As a national organization of coastal States, we look forward to working with Congress to develop legislation to ensure that this new 180,000 square mile area is governed and managed for the broadest and best public interest and good for the Nation and the States.

We sincerely appreciate the opportunity to present this testimony and our views, and we would be pleased to respond to any questions that you might have.

[The statement of Mr. Shafer can be found at the end of the hearing.]

Mr. **Shafer**. I do have one request. On behalf of the State of Texas, the land commissioner, Mr. Gary Mauro, who has submitted testimony as well, and we would like to submit that as part of the record.

Mr. **Hertel**. Yes.

[The statement of Mr. Mauro can be found at the end of the hearing.]

Mr. **Hertel**. Thank you, Chris.

Mr. **Shafer**. Thank you.

Mr. **Hertel**. Bob Davis, the Ranking Member of the full committee also wishes you his best, and thanks you for testifying today.

Mr. **Shafer**. Thank you.

Mr. **Hertel**. Ms. Iudicello.

STATEMENT OF SUZANNE IUDICELLO

Ms. **Iudicello**. Thank you, Mr. Chairman, members of the committee. The State of Alaska appreciates this opportunity to present our views on the presidential Proclamation extending the United States' territorial sea.

As a State with some 6600 miles of coastline, which is more than half the entire United States' coast, Alaska obviously has a strong interest in the expansion of the territorial sea. Moreover, as a State like North Carolina, which depends on its ocean resources for its economy, we are very concerned with the stewardship of marine resources off our coasts.

Just as an example, the wholesale value of Alaska's commercial fishing industry last year exceeded $2 billion and fisheries' product export was the largest source of our income.

But fishery resources are only the most obvious concern. The role the States are going to play in the 9 miles of expanded territory is going to govern issues ranging from environmental protection to community planning to resource development, and Alaskans believe that the State role should be an active one. We look forward to working with you to develop and define that role.

Today, we would like to focus on a few general areas, because we, as are others, are reviewing the Proclamation and its effects on our coastal zone. Alaska is a member of the Coastal States Organization and we support the views that have been expressed by Mr. Shafer, but we appreciate the opportunity to elaborate a little on the Alaskan perspective.

First of all, we would strongly urge that the Congress take action to implement the Proclamation and to clarify some of the confusing legal and policy questions that have been raised by it.

Legal scholars are going to debate this issue back and forth, and we would urge that you take the initiative so that these issues are not decided in the courts in what can be expensive and time-consuming litigation.

As a matter of sound public policy, Alaska believes that Congress needs to act in order to resolve these issues, based on action that you have taken in the past, and policy that was good 35-some years ago in the Submerged Lands Act, and we would like to encourage you to use that basis again.

In terms of the specific jurisdictional expertise of the States, Alaska, too, believes that there is a strong case for the States to have jurisdiction in this zone. Alaska has consistently demonstrated our competence in managing ocean resources, not only from our coastline out to 3 miles, but in the 200-mile zone as well, and we are not unique in that ability, as we have heard from the State of Michigan.

Alaska has a proven record showing experience and skill at balancing protection, conservation, and utilization of both living and non-living resources, and we have cooperated extensively with the Federal Government in managing fisheries, for example.

We now manage a multi-billion dollar seafood industry which includes the world's largest salmon fisheries, and several world-class salmon runs. We already exclusively manage some fisheries in the Federal waters such as rockfish, king and tanner crab, and others.

In fact the State of Alaska spends $20 million, 10 times what the Federal Government is spending to manage fisheries just in our 3-mile zone now, and the Federal Government manages the vast offshore area out to 200 miles.

We also have taken the lead in efforts with the State Department to get a handle on foreign interception of Alaskan-bound salmon and other issues of international importance. We have a lot of experience negotiating with other States and foreign countries in the harvest of anadromous species.

Alaska has also had a successful offshore mining program since statehood. Our program has provided minerals to industry and has ensured environmental protection on the coasts.

In contrast to the Federal Government which has never issued a single offshore mining lease off the coast of Alaska, there are currently nine active offshore leases which have been issued by the State, and more than 200 offshore prospecting permits, giving us the benefit of this type experience as well.

In the oil and gas field, the State of Alaska has a successful track record of evaluating potential, completing timely permitting, and balancing the complex interests which, for us, can be as varied as subsistence whaling and subsistence use of coastal resources.

Our stipulations and mitigating measures for oil and gas exploration offer environmental protection for marine life, and the subsistence life style of our communities, and we believe we can more efficiently and competently manage this resource in the 3- to 12-mile zone than can the Federal Government.

Finally, we would like to emphasize that as a policy matter, in addition to granting coastal State jurisdiction based on demonstrated competence in protecting resources, Congress concluded, properly, in 1953, that the States were the owners of the submerged lands within their boundaries, and in the waters over which they had jurisdiction.

The reasons that were good for this in 1953 are relevant today. First, as you have heard earlier, the States are most significantly impacted by activities in the territorial sea, and finally, and most importantly, it makes good sense to unify jurisdiction and ownership in one sovereign so that the police power is exercised coherently. Thank you.

[The statement of Ms. Iudicello can be found at the end of the hearing.]

Mr. **Hertel**. Thank you very much. We will take questions from the committee. Mr. Hughes.

Mr. **Hughes**. No questions.

Mr. **Hertel**. Mr. Shumway.

Mr. **Shumway**. Thank you, Mr. Chairman. Mr. Douglas, I have read the opinion which I guess you supplied to us from the Attorney General of the State of California, but I think it contains an inconsistency that needs to be developed, from my opinion, and I think there is a flaw in the legal analysis that it contains.

On the one hand, the opinion states that congressional intent in 1972 was that the coastal zone, as defined by CZMA, was to be coterminous with the territorial sea and thus expandable, if the territorial sea was to be expanded. Isn't that correct? That is one conclusion the opinion makes?

Mr. **Douglas**. That is correct.

Mr. **Shumway**. OK. On the other hand, the opinion states that the Proclamation does not alter State boundaries or affect the grant made to the States by the Congress in the Submerged Lands Act, and I think there is no doubt about that part of the opinion either.

But I think that points up the inconsistency. The Congress expressly defined the "coastal zone" as meaning the costal waters, including "the lands therein and thereunder," but the Proclamation—as you agree—does not grant States "the lands therein and thereunder" between 3 and 12 miles.

Therefore, I wonder how your coastal zone could be expanded to 12 miles by the Proclamation, if, indeed, you do not have jurisdiction over those lands from 3 to 12 miles?

Mr. **Douglas**. As we read the opinion of the Attorney General, Mr. Shumway, it only is extended for purposes of reviewing Federal activities as they impact coastal resources. So, only for purposes of Federal law, and the application of Federal law through the CZMA is that jurisdiction extended.

It is not extended for purposes of State permitting, so what we do not issue a permit. We only apply the Federal consistency review. Obviously ownership is not a question. So there are distinctions between the three types of jurisdiction or responsibilities.

Mr. **Shumway**. Well, I think the opinion could well be refined in that regard, because I think it does, as it now stands, contain a basic inconsistency.

But to follow up on that point, the requirements for Federal approval of a CZMA program, a Coastal Zone Management Program, includes submission by the State of a management program, and the language is "with standards to guide public and private uses of lands and waters in the coastal zone."

In addition to that, section 305(a)(4) of the CZMA requires the coastal State to spell out the means by which it proposes to "control the land and water uses in that coastal zone."

Since the California Attorney General has concluded that the Coastal Commission has no permitting authority between 3 and 12 miles, the California Coastal Commission really cannot "control" the land and water uses in the coastal zone out to 12 miles. And thus, it seems to me you do not meet the Federal requirements for a management program out to 12 miles, do you? Do you see it that way?

Mr. **Douglas**. No. I do not, Mr. Shumway.

Mr. **Shumway**. How do you see it?

Mr. **Douglas**. Not surprisingly, we have discussed this issue before, but the Federal Act, and the program that was approved for California, approved by the Federal Government, clearly envisioned a process whereby through the application of Federal consistency review, Federal activities beyond 3 miles could be and would be reviewed by the Coastal Commission for consistency with that State program.

So clearly, existing law and practice, in the absence of the Proclamation by President Reagan, already provides for limited control of activities outside the 3 miles.

All that we are saying—and I think the Attorney General's opinion says—is that that limited review is strengthened by the fact that the activities now beyond 3 miles, and up to 12 miles, are in the coastal zone for purposes of the Federal law.

Mr. **Shumway**. But you cannot review, can you, activities dealing with public and private uses of those lands within waters of the coastal zone? Only Federal uses, isn't that correct?

Mr. **Douglas**. No. We can review private uses as well because they require Federal permits in order to proceed. So, for example, offshore mining, or oil and gas development, those are private activities necessitating Federal permits. So we do have jurisdiction.

Mr. **Shumway**. Finally—I wish time would permit more questions, but I think we can submit questions for the record, and perhaps you can give us more extensive answers for the record.

But I get the impression from this opinion that there was a great deal of effort made to go back into the intention of Congress in adopting the laws that we have referred to, but, at the same time, there has been no attention given to ascertaining what the President's intention was when he made the Proclamation, and I think it was quite clear, that he did not intend it to be used by States to somehow enhance their jurisdiction, expand their control over Federal activities.

He made it very clear that he was doing this for international purposes only, primarily for national security, and to become consistent with international law. And I guess that is why I am a little bit concerned that States now are jumping at what appears to be a straw blowing by in the wind, and saying, hey, let's grab that, let's file law suits and race to the Supreme Court so that we can somehow enhance our jurisdiction and have a little more clout vis-a-vis the Federal Government.

I think that is something that States need to look at more carefully, and hopefully, legislation like H.R. 1405, or something like it will be enacted to clarify what our intention was. Thank you, Mr. Chairman.

Mr. **Hertel**. Other questions? Mr. Pallone.

Mr. **Pallone**. I understand your analysis, Mr. Douglas, and I tend to agree with it with regard to the application of the territorial sea, and that now consistency determinations would have to be done out to the 12 miles.

I am not sure I understand what the difference would be; why it matters. In other words, it is not what happens within the 12 miles that is really the key; it is, rather, the effect of Federal actions on the coastal zone.

So, for example, in the case of New Jersey, if we have a 106-mile sewage sludge site we can make the argument that that has an effect within 3 miles, or within 12. After all, this legal analysis that you have done—which I agree with—why would it make a difference? I am not sure I understand that.

Mr. DOUGLAS. Yes. There are several reasons. One is that in terms of California—and other coastal States may have a similar situation—much of the offshore activity such as dredge spoil disposal, oil and gas development, the dumping of drill muds and cuttings, impacts on fisheries occur within that 12 miles. So it is——

Mr. PALLONE. But isn't the key not where it occurs, but the effect? In other words, even if it is 20 or a 100 miles offshore, as in the case of New Jersey, the impact is still felt within 3 or 12, so why does it matter that much?

Mr. DOUGLAS. You are absolutely right. The difference is that if it occurs, the activity occurs within 12 miles so we do not have to go through a showing—a preliminary showing—that there are spillover effects in the 3-mile coastal zone, because by virtue of its location in the 12-mile coastal zone, it, by definition, has an impact on the coastal zone.

Another example of the difference it makes is the dumping dredge spoils. Formerly, we have had to look at the currents and the impact of those dredge spoils in the 3 miles. We could not look at the impacts on the bottom below the dumping site, which may be 8 or 10 miles offshore. There may be a fishery there or a resource there that is smothered by the disposal of the muds. We could not look at that because that is not, in effect, inside the 3 miles.

So in that sense it makes a difference.

Mr. PALLONE. OK. Thank you.

Mr. HERTEL. If the States had the jurisdiction all the way to 12 miles, do you see any problem in the States having the resources, the coastal States, to meet the responsibilities in these areas, Mr. Shafer?

Mr. SHAFER. I think in many instances, Mr. Chairman, the States would already have adequate resources to deal with those expanded responsibilities, and I think if the States have a real commitment to managing our offshore resources, which 28 of the Nation's States do by virtue of having a federally approved costal management program, I think they would expand their resources to be able to adequately address those issues.

The resources and the costal issues do not respect that arbitrary 3-mile limit, and I think the States would definitely be able to address those management responsibilities very well.

Mr. HERTEL. I thank the panel very much and I am sure we will be in touch with you in the future. Thank you.

The next panel. Mr. Paul Kelley, Vice President of Rowan Companies, National Oceans Industry Association, and also representing the American Petroleum Institute; Mr. James Gilmore on behalf of the Alaska Factory Trawlers; Mr. Bill Myhre from Preston, Thorgrimson, Ellis and Holman. Mr. Kelley.

STATEMENTS OF A PANEL, CONSISTING OF PAUL KELLEY, VICE PRESIDENT, ROWAN COMPANIES, INC. ON BEHALF OF NATIONAL OCEANS INDUSTRY ASSOCIATION AND AMERICAN PETROLEUM INSTITUTE; JAMES GILMORE, ALASKA FACTORY TRAWLERS; AND BILL MYHRE, ESQUIRE, PRESTON, THORGRIMSON, ELLIS AND HOLMAN.

Mr. KELLEY. Mr. Chairman, and members of the subcommittee, I am Paul Kelley, Vice President of Rowan Companies, Incorporated, and today I am testifying on behalf of the National Ocean Industries Association, which represents over 325 companies engaged in all aspects of domestic offshore oil and gas exploration and development.

My statement is endorsed by the International Association of Drilling Contractors, and the American Petroleum Institute which represents oil and gas producers.

Mr. Chairman, in the interest of saving time I would like to summarize my written statement by responding, briefly, to each of the three questions raised in the invitation to witnesses to testify in this hearing.

First, what effect does the Proclamation have on existing domestic law? It is our position that the presidential Proclamation of December 27, 1988, extending the territorial sea from its traditional seaward boundary of 3 miles to its new boundary of 12 miles was prompted by national security concerns.

This is clear from the language of the Proclamation. It is equally clear that the scope of the Proclamation is limited to international purposes. It is neither intended nor, in our view, does it alter existing Federal or State law, nor does it affect the domestic rights or legal interests of the Sates, or the Federal Government.

Secondly, what should Congress do to implement the Proclamation? It is our position that the issuance of this Proclamation, in the interest of national security and in the context of international law, does not and should not be justification for alterations in the Federal-State relationship that exists in the area of coastal and ocean policy.

These relationships are complex and diverse. They are embodied in numerous Federal and State statutes, and regulations, and they touch a vast array of public and private interest.

The offshore oil and gas industry is only one of the many interests involved in the interplay of Federal and State authority over costal and ocean policy.

The Federal-State partnership may not always be perfect, and, in the view of many, some domestic laws and regulations may be in need of adjustment. But extending regulatory jurisdiction of the costal States beyond its current reach in our opinion is not the answer.

We like to think that the presidential Proclamation stands on its own in terms of its national security purposes, the foreign relations powers of the President, and the separation of powers.

However, as we have seen today, there is some difference of opinion, and in order to eliminate confusion on the part of State and Federal Government agencies, and users of the oceans off the coasts of the United States, and to avoid the possibility of costly and timely litigation, we would support legislation along the lines of H.R. 1405, the bill introduced by Congressman Shumway, which affirms the presidential Proclamation and specifically states that Federal and State authority under domestic law should not be extended beyond its previous geographical limits by the extension of the territorial sea.

An alternative to this legislation would be a joint resolution.

The third question raised in the invitation letter to witnesses is what role, if any, should the States have in the extended territorial sea, 3 to 5 miles?

From our standpoint, the coastal States already have adequate protection of their coastal zones through the consistency provisions of the Coastal Zone Management Act.

This protection already extends to activities in our industry which take place beyond the 3-mile limit and which directly affect the coastal zone.

To grant the States full regulatory authority over a large portion of the Federal Outer Continental Shelf through amendments to the Clean Air Act, the Clean Water Act, and the Coastal Zone Management Act, for example, would relegate the national interest in this area to a secondary position versus the interests of individual States.

The Outer Continental Shelf contains vast and diverse resources that should be balanced in a managed fashion with Federal, State and local interests in mind.

However, in those cases where conflict does arise, we submit that the national interest must prevail. To grant individual Stats regulatory primacy over this vast area of Federal territory would be an abdication of the responsibility of the national Government to manage this area and its resources for the benefit of the whole Nation.

The only way to assure that the national interest will prevail is to continue to vest final decision-making authority in the Federal Government.

Whether or not the coastal zone should be extended from 3 to 12 miles for purposes of the Coastal Zone Management Act should more appropriately be considered separately by the Congress, and not by means of the strained interpretation of the President's Proclamation indicated by the California Coastal Commission, which implies that the President did not do what he intended to do, or what he wanted to do.

In conclusion, existing statutes and regulations governing the Federal-State relationship, and coastal and ocean management, whatever their shortcomings, should not be extended to the new boundaries of the territorial sea.

We believe Congress should not use a step taken by the President for national security reasons in the arena of international law as an excuse to justify fundamental changes in these laws and regulations. Thank you.

[The statement of Mr. Kelley can be found at the end of the hearing.]

Mrs. LOWEY [presiding]. Mr. Gilmore.

STATEMENT OF MR. GILMORE

Mr. GILMORE. Thank you. I apologize for the late notice given the subcommittee about Mr. Evans's absence, and appreciate you allowing me to substitute for him today.

My name is Jim Gilmore and I am testifying on behalf of the Alaska Factory Trawler Association, and several other fishing groups: the American High Seas Fisheries Association; the Fishing Vessel Owners Association; the Midwater Trawlers' Cooperative; the North Pacific Fishing Vessel Owners Association and the Northwest Fisheries Association.

These groups share a common concern about the impact of the extension of the territorial sea on, one, domestic law for the management of fisheries, and two, on the operation of fishing industry vessels in U.S. waters.

These organizations want the present inner boundary of the Exclusive Economic Zone to remain unchanged.

Since the Magnuson Fishery Conservation and Management Act was enacted in 1976, U.S. fishermen have operated within a fisheries management structure that includes Federal representatives and State officials from the region in the decision-making process.

Seven national standards guide the management of U.S. fisheries resources from 3 to 200 miles. Two of those standards provide that individual stocks of fish shall be managed as a unit throughout their range and that conservation and management measures shall not discriminate between residents of different States.

The Magnuson Act represents a series of compromises which balance the interests of fishermen of the Nation, many of whom fish in waters that may be somewhat distant from their State.

In the North Pacific, substantial capital investments have been predicated on this system. The U.S. fishing industry invested $1 billion in the 1980's constructing vessels which have displaced foreign fishing fleets from U.S. waters. U.S. shoreside and floating processors are now utilizing almost all of the groundfish resources of the Bering Sea and the Gulf of Alaska.

It is the investment stability caused by the assumption of management by the Federal Government over these resources which led to the creation of a new industry in Alaska and the Northwest States.

North Pacific groundfish stocks are managed as a single stock unit within the U.S. zone, and significant portions of those stocks are located between 3 and 12 miles off the coast.

It would be extremely unwise to bifurcate management of these important stocks by making them transboundary stocks.

The resultant split between management authorities would be extremely inefficient and controversial. Management and enforcement would be more expensive, and dollars for these programs are hard enough to come by already.

Congressman Lowry's bill in the 100th Congress, which addressed the extension of the territorial sea to 12 miles, also provided that no change in boundaries for domestic purposes would occur, and explicitly called for retention of the status quo for fisheries jurisdiction.

We supported the Lowry approach in testimony before this subcommittee in August of 1988, and we continue to hold that position which we believe is consistent with the approach to H.R. 1405, Congressman Shumway's bill.

In addition to management issues, it is also imperative that any extension of the territorial sea not interfere with the operation of fishing and fishery support vessels in the Exclusive Economic Zone.

Joint venture operations utilizing foreign processing vessels should, for example, continue to be allowed within the 3- to 200-mile zone as presently defined, and foreign transport vessels should remain eligible to pick up cargo from U.S. vessels up to 3 miles offshore.

Thank you for inviting the participation of the fishing industry at this hearing, and I would be glad to answer any questions you might have.

[The statement of Mr. Evans can be found at the end of the hearing.]

Mrs. Lowey. Thank you, Mr. Gilmore. Mr. Myhre.

STATEMENT OF MR. MYHRE

Mr. Myhre. Thank you. My name is Bill Myhre, and I am a partner in the Washington, D.C. office of the law firm of Preston, Thorgrimson, Ellis and Holman.

Our firm represents a wide variety of clients in the maritime and fishing industries whose operations may be affected by the President's Proclamation extending the territorial sea to 12 miles.

I am appearing here not on behalf of any particular client, but, rather, as a practitioner who faces laws that are or may be affected by this Proclamation on a regular basis. I am concerned about the potential confusion and uncertainty created by the President's Proclamation.

Assuming it does effectively extend the territorial sea out to 12 miles, the Proclamation raises at least two threshold questions.

The first is whether the President has the authority to do what he said he did, that is, to extend the territorial sea for certain select purposes, such as, national security, but not for others.

If he does not have this authority, and in effect has already extended the territorial sea for all purposes, the second question is what then is the impact on those activities that are governed by laws the jurisdictional basis of which depends on the definition of the term "territorial sea"?

It is that second question which I address in my testimony today. In order to get a handle on this, we looked at the terms "territorial sea" and "territorial waters" to see where they appear in the U.S. Code, and the Code of Federal Regulations.

A simple computer search revealed that these two terms appear in 151 separate sections of the Code, and 218 individual sections of the Code of Federal Regulations.

But that is really only the "tip of the iceberg." You cannot look at those two terms alone. There are others which rely on the territorial sea definition: "navigable waters," "high seas," "domestic voyages" and "waters under U.S. jurisdiction" some of which were referred to in the Coast Guard testimony earlier today.

When you look at these terms, the total number of affected provisions jumps to over one thousand—some 392 statutes and 614 sections of the Code of Federal Regulations are potentially affected.

And what is more, a computer search like this does not pick up everything. Statutes like the coastwise laws depend upon the territorial seas for their application, yet the term "territorial seas" appears neither in the statute nor the regulations, so it would not be picked up in a search like this.

Obviously, the potential ramifications of this Proclamation are enormous. To give a few examples—I will not go through all 1000 provisions this afternoon—I will begin with one of the most obvious: the application of the coastwise laws.

As you know, the coastwise laws affect the transportation of merchandise between points in the United States. The Customs Service has defined the jurisdictional reach of the coastwise laws to include activities within the territorial sea. Thus, any movement of merchandise between any two points in the territorial sea, or between a point in the territorial sea and land, must be undertaken on a coastwise-qualified vessel. A coastwise qualified vessel is one that is built in the United States, is owned by U.S. citizens, is documented under the U.S. flag, and has never been foreign-documented or foreign-rebuilt.

The question then is: What economic activities occur between 3 and 12 miles that would be affected by an extension of the territorial sea? Offshore oil activities and fishing come immediately to mind.

Offshore oil activities generally have to be conducted on coastwise-qualified vessels under separate statutory authority, but that is not the case with fishing vessels.

Take, for example, a fish-processing vessel operating outside of 3 miles but within 12. The vessel takes on fish caught by independent harvesting vessels, processes that fish, and moves the processed product to a U.S. port.

That is a permissible activity for a non-coastwise qualified vessel. But if the territorial sea were extended out to 12 miles for coastwise purposes, then that activity would suddenly become impermissible. It would not be able to be undertaken on that vessel to the substantial detriment of the owner.

And there are many fishing industry vessels that are not coastwise qualified. The reason is that until a recent change in the law, fish processing and fish tender vessels could be foreign-built, and all fishing industry vessels could be rebuilt abroad.

Even now fishing vessels may have been documented overseas in the past without jeopardizing their fishing privileges. But all of these vessels—foreign built, foreign rebuilt or foreign documented—have permanently lost their coastwise privileges.

Many fishermen have undertaken significant investments in these vessels in reliance on the existing law. Yet the inadvertent extension of the territorial sea for coastwise purposes would undermine the 200-year history of our coastwise laws which has always allowed these vessels to operate between 3 and 12 miles. Such a change in the law would preclude these questions.

Similar examples can be seen in vessel safety statutes as well. Regularity schemes have been established where vessels operating close to shore must meet less stringent requirements than those operating farther out and on the high seas. Thus, a change in the definition of navigable waters, or territorial sea would extend the area of permissible operation for those vessels allowing them to operate where they could not before without meeting the more stringent requirements. My prepared testimony cites other examples.

This is not to say, however, that all of those 1000 provisions are adversely affected. I would agree with the earlier witnesses today that the Magnuson Act and other fishery statutes cited in my prepared remarks, are not adversely impacted by a simple extension of the territorial sea.

In sum, there is a tremendous potential for confusion and uncertainty out there for those who are operating vessels in reliance on existing laws which utilize some definition of the term territorial sea or its derivatives. They would prefer not to wait for a final judicial resolution, but, rather, to have Congress act, or to have something done to remove the uncertainty for those who must rely on these laws in their day-to-day operations.

Thank you.

[The statement of Mr. Myhre can be found at the end of the hearing.]

Mr. Hertel [presiding]. Questions from the committee? Mr. Pallone.

Mr. Pallone. Thank you. My tendency would be to favor extension of the States' jurisdiction. Both the Alaska representative on the previous panel and the North Carolina representative indicated the benefits of that with regard to environmental concerns, enforcement of environmental laws, as well as with regard to fisheries concerns, because States traditionally manage fisheries within the 3-mile limit.

I wanted to ask Mr. Gilmore, what do you perceive as the problem, particularly with regard to the fisheries jurisdiction?

In other words, as your Alaska representative before said, you did extend the Magnuson Act so that it was a 12-mile sea for fisheries jurisdiction and the States therefore controlled fisheries' activities within the 12 miles.

What do you see as a problem with that?

Mr. Gilmore. We think the present system under the Magnuson Act, where you have a body established that has Federal and State representatives on it to coordinate fisheries' management activities is more effective than having individual States each going out farther and farther, with possibly conflicting laws. Looking up in the New Jersey area, the striped bass example is—where you had each State on the East Coast had a separate regulation on striped bass, and in order to get a comprehensive approach, eventually, they asked the Federal Government to come in with a more comprehensive approach. And that was on a fishery that rarely is prosecuted outside the 3-mile limit.

But just in order to make enforcement easier, and conservation better, they went to that system. We think, by and large, the Magnuson Act has been a successful approach in a number of fisheries.

Mr. Pallone. But see, the very example you are using is why I would argue in favor of the States having jurisdiction because New Jersey feels very strongly that the Federal Government has mismanaged the striped bass and really does not know what it is doing.

And we have had all this testimony before the Merchant Marine Committee about how the Federal Government does not want to spend any money in these areas, and yet they want to take the jurisdiction. So I understand where you are coming from, but, to me, it kind of proves the opposite point. But thank you.

Mr. HERTEL. Mr. Shumway.

Mr. SHUMWAY. Thank you, Mr. Chairman. Mr. Myhre, I realize that as a lawyer you make your living advising people and trying to steer through ambiguities in the law, and I therefore think it is courageous of you to come before us and tell us that we should cure some of those ambiguities, in this particular case ambiguities that may be created by the President's Proclamation and existing statutes.

And I think, indeed, that is our purpose. We would like to avoid—as earlier witnesses referred to—throwing this to the third branch of Government and having to wait and go through the expense, and time of court decisions, and so we are trying to straighten out some of the ambiguities.

I am just wondering if you have had a chance to look at the bill we have discussed this afternoon, and if you think that bill sufficiently answers some of these ambiguities, or, if not, in what respects might we improve it? How much more specific should it be, if it is deficient in its present form?

Mr. MYHRE. Yes, I have. I think the bill is definitely a step in the right direction. It is the kind of step that the Department of Justice recommended in its memorandum last fall on the subject. Action by Congress in this area would help, for example to remove the potential for challenge by a competitor of one of the vessels we talked about earlier; it would help to bring a needed level of certainty.

In terms of changes to the legislation, the kind of commission approach that was used in the Lowry bill, in the last Congress, is one way to help coordinate all of the potential changes in this area so that they are complementary to each other.

Mr. SHUMWAY. Thank you, Mr. Chairman.

Mr. HERTEL. I thank the panel very much, and call for the last panel of people to testify. Rear Admiral Bruce Harlow, former Law of the Sea negotiation; Mr. Robert Knecht, a senior lecturer in Environmental Studies and Political Science, University of California at Santa Barbara, Assistant Administrator for Coastal Zone Management, NOAA; John Catena, Executive Director, Oceanic Society. Admiral.

STATEMENTS OF A PANEL, CONSISTING OF REAR ADMIRAL BRUCE HARLOW, RETIRED, FORMER LAW OF THE SEA NEGOTIATOR; ROBERT KNECHT, SENIOR LECTURER IN ENVIRONMENTAL STUDIES AND POLITICAL SCIENCES, UNIVERSITY OF CALIFORNIA AT SANTA BARBARA, AND ASSISTANT ADMINISTRATOR FOR COASTAL ZONE MANAGEMENT, NOAA; AND JOHN CATENA, EXECUTIVE DIRECTOR, OCEANIC SOCIETY

Admiral **Harlow**. Thank you, Mr. Chairman. I am Bruce Harlow, and I will briefly summarize my statement and ask that it be included in the record.

By its own terms, the presidential Proclamation establishing a 12-mile territorial sea, in and of itself, does not extend or otherwise alter existing Federal or State law.

The Proclamation has, however, dramatically altered the legal status of the area between 3 and 12 miles. Regardless of the presidential disclaimer, in my opinion, the altered legal status does have a significant impact on domestic law.

I agree with the language in the presidential Proclamation which in and of itself purports not to change the law. I believe that is appropriate. It is I believe up to Congress to decide the congressional intent and extent of application of Federal law.

But in order to fulfill the international purpose intended, what the President did is assert complete sovereignty and jurisdiction over the area. In this expanded territorial sea and air space, the only commitment to the international community was the international obligation to recognize rights of international navigation.

In a legal sense, the boundary of the United States was extended seaward 9 miles, and it is that aspect, in my judgment, that has an impact on domestic law.

It was discussed earlier, that there are laws that refer to territorial sea, high seas, coastal zones, and other references to the maritime areas that may be affected.

I think we also have to broaden the class of laws that may be affected to those that are applicable "in the United States," because, in my judgment, we are now dealing out to 12 miles with activities that occur within the United States. If you include those laws, the list becomes very long, indeed.

In my judgment, it is beyond reasonable argument to conclude that Congress has less power, indeed, less responsibility to legislate in the 3- to 12-mile portion of the territorial sea than it has in the historic 3-mile zone.

It has been stated that the territorial sea was enacted for international purposes, but, in my judgment, fulfillment of international purposes will, in turn, rely, to a large extent, on the application of Federal law to this zone.

There are extraordinary rights of self-defense, and constitutional rights that the Federal Government has even in the absence of Federal laws but when we get into the arena of law enforcement, a skein of applicable Federal law is essential, to fully realize and exercise Federal authority.

Aside from the revenue-sharing issue, I believe research will disclose that the congressional intent, in many instances, is that Federal laws and regulations would be applicable to the territorial sea regardless of its breadth, and here, I give emphasis to the fact that we are now dealing with an area, in my judgment, that can appropriately be described as "within in the United States."

As a first step, therefore, I recommend that Congress implement the Proclamation by identifying current legislation deemed to be in force in the expanded territorial sea by virtue of preexisting congressional intent.

Secondly, Congress should identify gaps in current legislation created or exacerbated by the broadened territorial sea, and enact new legislation as may be required.

And thirdly, it is recommended that Congress examine the broader question of State versus Federal rights and responsibilities, not only in the expanded territorial sea, but also in the Exclusive Economic Zone established by presidential Proclamation in 1983.

Aside from the issue of revenue-sharing, I believe, as a general principle, the State, commonwealth, and territorial Governments should have the same rights and responsibilities in the expanded territorial sea as they currently possess in the 3-mile territorial sea.

It makes little sense to establish a unique Federal enclave in the portion of the territorial sea from 3 to 12 miles, and, indeed, it seems to me that there is legislative history with regard to coastal zone management, and other issues, wherein Congress has recognized there may be a legitimate, albeit, limited role of State Governments in U.S. maritime zones—not strictly limited to 3 miles.

In conclusion, let me emphasize that I agree with the thrust and purpose of the bill introduced by Congressman Shumway.

I believe that a review is essential. My concern, however, is that the bill could be read as limiting Federal laws which otherwise would be applicable to this area based on preexisting congressional intent.

In this regard, I believe we are dealing with a huge body of law, and I personally feel it may be dangerous to limit, or otherwise restrict application of this law until such time as further congressional review is completed.

I will be pleased to answer any questions you may have. Thank you.

[The statement of Admiral Harlow can be found at the end of the hearing.]

Mr. HERTEL. Thank you. Mr. Knecht.

STATEMENT OF MR. KNECHT

Mr. KNECHT. Thank you, Mr. Chairman. I appreciate the opportunity to be here today to talk to you about this important issue. I will try to summarize my main points.

The extension of the U.S. territorial sea is important, even overdue. It is clearly important to the national security interests of this Nation. Most other coastal nations have done so a long time ago. It is fully consistent with international law. It was an important step that was overdue, in fact.

But obviously, the U.S. can have only one territorial sea. The list of the territorial seas of the nations of the world is not going to have an asterisk alongside the U.S. with a footnote at the bottom of the page saying "12-miles for international purposes only; 3-miles for domestic purposes,."

That is a non-starter, I think. We have just one territorial sea in the United States, now, and it is 12 miles in width for all purposes, and that extension has domestic implications, whether or not it was the President's intention to do so.

The 9-mile zone of the newly expanded territorial sea is now sovereign U.S. territory. Governance of this new sovereign territory is plainly a domestic issue. In general, territory acquired by the United States becomes a State or a self-governing territory.

Some of the issues raised by the approach contained in H.R. 1405 would be as follows:

There would be created in the United States, an extensive stateless area. A stateless area of this magnitude is unique in the U.S.

The existence of two different domestic regimes in our territorial sea would occur with coastal state control in 0 to 3 miles, and Federal agency control in 3 to 12 miles. Messy, to say the least.

Furthermore, we lack of any mechanism for the planning and management of the 3- to 12-mile portion of our territorial sea. We have coastal zone management in 0 to 3 with the Coastal States. Nothing of the sort exists, for 3 to 12.

I consult for the State of Hawaii on matters of this kind.

The status quo approach surrounds Hawaii with a stateless ring of sovereign U.S. territory, 3 to 12 miles in width. The United States, in every aspect, except stateless.

In recent times, Hawaii has been working with the Interior Department, the Minerals Management Service, and has largely achieved a kind of partnership in the leasing of minerals activities in the EEZ, beyond 3 miles.

That partnership has come about through a lot of hard work, 3 years' worth of effort by the State of Hawaii, and the Federal Government. Indeed, a move of the type that we are now contemplating—a unilateral move by the United States without any consideration of the domestic implications—would fly in the face of this effort to create a working partnership to manage ocean resources.

Indeed, the Hawaii legislature is considering a resolution requesting Congress to look at the Federal-State implications of the territorial sea expansion and, the earlier EEZ Proclamation as well which is, in many ways, a similar kind of action. The resolution also requests the Congress to commission a study of the domestic ramifications of both of these steps.

Separately, several of us are collecting a list of the policy and legal issues that the territorial sea extension raises, and attached to my testimony is a list of nine of these issues.

We are about to commission a study among legal scholars and policy experts of these issues, and hope to have the results available by the end of June.

I urge that your committee schedule additional hearings so that you can take account of the results of studies such as these, and other studies that are surely under way, and to receive the views of additional coastal States.

Given the importance of this issue, and the uncertainties that are inherent in it, it seems to me that the idea of a commission—a national ocean policy commission, or a State-Federal territorial sea commission, or a Select Committee of the House of Representatives—is needed to examine fully the ramifications.

A "quick fix" via H.R. 1405, it seems to me, would be inappropriate and ill-advised.

In conclusion, Mr. Chairman, the territorial sea is more than simply a national security zone. It is the coastal ocean of the United States. It is our most used and most useful coastal ocean space. It is the only ocean space over which the United States has total sovereign control, and, as such, it is our most valuable ocean space.

Consequently, the planning and management of the territorial sea is critically important and deserves to be carried out in a coherent and rational manner, something that will not occur if we have a bifurcated territorial sea of 0 to 3, and 3 to 12.

In short, Mr. Chairman, I urge that you and your committee treat the territorial sea as the highly important domestic asset that it really is. Thank you.

[The statement of Mr. Knecht can be found at the end of the hearing.]

Mr. HERTEL. Thank you. Mr. Catena.

STATEMENT OF MR. CATENA

Mr. CATENA. Thank you, Mr. Chairman, members of the subcommittee. I am John Catena, science policy analyst for the Oceanic Society.

I appreciate the opportunity to share our views on the newly established 12-mile territorial sea, and H.R. 1405, the Territorial Sea Extension Act of 1989.

While it is clear that the driving force behind the extension of the territorial sea to 12 miles was to enhance national security, the Proclamation at the same time raises complex questions for domestic law and policy.

In our view, these questions must be resolved through congressional action.

In this regard, we appreciate your efforts, Mr. Chairman, to take this necessary first step in examining this complex issue.

Numerous Federal laws and policies are potentially affected by the extension of the territorial sea, despite the Proclamation's disclaimer that no Federal or State law has been altered.

In fact there already are instances where Federal agencies have extended their authority out to the 12-mile territorial sea.

For example, the Department of State is now controlling access to the 12-mile territorial sea for the purpose of conducting marine scientific research by foreign scientists.

While this is clearly within the right of the U.S., it makes it unclear as to exactly what the above disclaimer applies to.

In my prepared statement I have discussed a few select examples of pertinent laws and policies which highlight the ambiguities in congressional intent in the use of the term "territorial sea."

These include the CZMA, the Magnuson Fisheries Conservation and Management Act, and the Ports and Waterways Safety Act.

From those, and other examples, it is clear that Congress must enact legislation clarifying the meaning of the term "territorial sea." We, however, do not believe that H.R. 1405, the Territorial Sea Extension Act of 1989, as written, represents the best course of action.

This bill simply reaffirms the Proclamation and makes no effort to clarify the numerous different uses of the term "territorial sea."

In addition, it is our opinion that the Proclamation coupled with H.R. 1405 are only added examples of a piecemeal approach to U.S. ocean policy.

As the territorial sea Proclamation clearly exemplifies, ocean policy issues cannot be decided in a vacuum. This issue represents one more reason for a comprehensive review of U.S. ocean policy. In this regard, we appreciate Representative Schneider's, and other members of this committee's call for such a policy in H. Con. Res. 69.

Such a review could be conducted by a national oceans policy commission, as proposed in previous legislation, or some other similar body.

Additionally, a reconstituted NACOA could be reestablished to carry forward and monitor the implementation of the commission's recommendations over the long-term.

A more modest approach, however, would be for Congress to mandate a comprehensive study of the effect of the territorial sea extension on domestic law and policy.

The Department of Justice opinion was too narrow in scope in that the only statute it considered was the CZMA.

Clearly, numerous other laws are affected by the Proclamation and deserve a more thorough examination.

Several mechanisms are available, or could be created to carry out such a study. These include a distinguished panel of ocean policy practitioners, the congressional Office of Technology Assessment, or an existing or new Federal interagency group, including public advisory committee input.

Regardless of whether or not Congress did or did not define the term "territorial sea" in each and every statute, now that a new definition of the term exists—in other words, that it extends 12 miles from the baseline—Federal laws should be amended to incorporate that definition, or use another term to maintain the 3-mile limit for State waters, where that is preferable. The point being that the "territorial sea" should have a consistent definition throughout the U.S. Code.

Given the importance of the decision to extend the U.S. territorial sea, and its potentially far-reaching effects on domestic law and policy, Congress must act to clarify the meaning of the term "territorial sea."

This, however, should be preceded by a thorough study of the effect of this extension on U.S. law and policy, either separately or as a component of a larger comprehensive review of U.S. ocean policy. Thank you.

[The statement of Mr. Catena can be found at the end of the hearing.]

Mr. **Hertel**. Mr. Knecht, how do you see the protection of the natural environment being best insured? Through State jurisdiction or Federal jurisdiction?

Mr. **Knecht**. Well, that is a difficult question, Mr. Chairman. We obviously have to do a better job than we are doing at the present time. I think that part of the problem, involves interjurisdictional conflict. Ultimately, I would like to see more of a partnership between the Federal Government, and State Governments and territories in managing our coastal waters.

If it were up to me, I would like to look at the whole territorial zea (0–12) and devise a second generation approach for managing the coastal and ocean environment involving a cooperative program between State and Federal Government.

We have fragmentation galore at the present time—fragmentation geographically and by function—and we are going to add another divisive boundary line, now, at 12 miles. We have problems at the 3-mile line, which apparently some people want to keep, and then now we are going to add problems at the 12-mile line. I do not think that is the answer.

I think we need a study, actually, Mr. Chairman, to find out what the best solution is.

Mr. **Hertel**. Mr. Catena, as far as enforcement of our environmental laws, do you see a problem with the Federal Government alone not having enough funds, actually, to accomplish the job?

Mr. **Catena**. Well, I think the best example—as I have pointed out in my written statement—is concerning the Coast Guard's authority to regulate maritime traffic within the territorial sea.

From an environmental perspective I think it would be within the best interests of the environment to extend the Coast Guard's authority to regulate that traffic, and a specific example would be, for instance, in the Santa Barbara Channel.

This committee is familiar with problems in that area with respect to the amount of traffic. The Coast Guard, however, is not able to unilaterally regulate traffic beyond 3 miles at the current time.

Mr. **Hertel**. Well, I am interested in that question, in pursing that issue. In fact we found in the Great Lakes that there is a question of how much authority the Coast Guard has.

To me, the authority is clear. It seems to me that their judgments as to what they can enforce have been decided because of manpower problems rather than their legal authority on some of these issues.

So, when we talk about the future of, you know, this great amount of area, then that concerns me, that we cannot properly enforce the laws, enforce the laws that we work so hard to bring forth.

Mr. Knecht, you had several ideas—so did you, Mr. Catena—on studies—and you did, too, Admiral—from ad hoc committees to a national commission. Which do you think would be superior, if you had your choices?

Mr. **Knecht**. If I had my choice, Mr. Chairman, I would prefer a national ocean policy commission, the legislation for which has passed the House, I think, on two earlier occasions, but fails to attract the necessary interest in the other body.

So many things have happened since the Stratton Commission conducted its study more than 20 years ago. The entire Law of the

Sea has changed. The environmental movement has come and matured.

The whole energy situation has changed dramatically, oil prices being at least 10 times what they were. We also see increased State competence, coastal zone management, the whole body of environmental law of the 1970's. So many changes have occurred, yet the last time we studied this matter was 20 years ago.

I think the oceans and coasts deserve that kind of thorough reexamination. I think that would be the best approach.

Admiral **Harlow**. Mr. Chairman I share those views, although I certainly think it is important to emphasize the need for a focused study, one that will not go on the shelves and be ignored; because the need is urgent. We are facing, I believe, a national as well as local issue that is pressing upon us, that is, the extent of application of U.S. law across the whole spectrum of this broadened territorial sea, and, indeed, the broader question of how the 200 mile exclusive Economic Zone will be administered.

I think further study is essential, and the results must be produced in a short period of time.

I must also add, with respect to maritime matters, the coastal States and the Great Lakes States, have greatly matured over what the situation was 20 years ago.

They are much more capable of coming to grips with the responsibility of coastal zone management. I believe, therefore, the interests of our union would be well served if Congress thought in terms of a positive Federal/state partnership and got away from the "zone approach" which continually raises the issue as to where the boundary is.

And I must say as an aside, I believe one of the reasons why the United States has been deficient in its international obligation to define baselines from which the territorial sea and other zones are measured, is because the question of revenue-sharing, and other regulatory responsibilities is dependent upon this baseline.

I would therefore hope that review and analysis would include the possibility of working toward a positive partnership in which it is not an either/or jurisdictional situation—one in which the lines are no longer significant, as they have been in the past.

Mr. **Hertel**. Mr. Catena.

Mr. **Catena**. Yes. I also would like to add—I would like to agree with Mr. Knecht on the need for an ocean policy commission. At the same time, my suggestion for a more narrow-focused territorial sea commission was to prevent any unnecessary litigation that may follow, by producing a study in a timely manner.

I think the longer we wait to act, the more chance that a State, or some other interest is going to pursue litigation.

Mr. **Hertel**. Well, I am glad the three of you have discussed the other examples. The ad hoc congressional committee I think very often makes sense, but, in this case, Foreign Affairs and Judiciary would have and do have joint jurisdiction on this question with this committee.

But this subcommittee I think has the primary authority, and focus, and that is why the Members are on it from the various States, and personal interest that those Members have also.

So, I think that we are going to take our time in considering the question, and all aspects of it, from my viewpoint, chiefly being charged with the environmental concerns for the future, where, in other forums, we might get into more of the cost benefits to be derived. Those are major issues, but primarily, the protection of the environment is our greatest responsibility here.

I appreciate, again, this panel coming, your testimony, and all of the people for not only their statements and research, but in being brief this afternoon, as the subcommittee, in this session of Congress, takes its first view of this question.

There will be a good deal more time for people to make other views known, and any additions to your testimony—there will be additional questions, I am sure, from the committee and staff on this issue, and we thank people for the brevity of their testimony today only because of the lack of time with so very many witnesses.

We appreciate that very much, and we will be asking you for your advice and counsel in the future.

The committee meeting is adjourned.

[Whereupon, at 4:03 p.m,. the subcommittee was adjourned, subject to the call of the Chair.]

[The following was submitted for the record.]

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BACKGROUND MEMORANDUM

TO:	Members Merchant Marine and Fisheries Committee
FROM:	Full Committee and Subcommitee Staff
DATE:	March 16, 1989
SUBJECT:	Implementation of the Territorial Sea Proclamation

On **Tuesday, March 21, 1989, at 2:00 PM in Room 1334** Longworth House Office Building, the Oceanography Subcommittee will conduct a hearing on the President's Proclamation of a 12-mile territorial sea for the United States. The Subcommittee also will consider H.R. 1405, a bill introduced by Mr. Shumway to affirm the Proclamation and codify the status quo prior to the issuance of the Proclamation.

The hearing will consist of witnesses from the Federal Government (State Department, Interior Department, Coast Guard and NOAA); states (including North Carolina, the California Coastal Commission, the Coastal States Organization and Alaska); industry (including the American Petroleum Institute (API), the National Ocean Industries Association (NOIA), and the Alaska Factory Trawlers Association); and academic, legal, and environmental experts.

BACKGROUND

The Proclamation

On December 27, 1988, President Reagan issued Proclamation No. 5928, extending the territorial sea of the United States from 3 to 12 nautical miles. A copy of the Proclamation is attached. (See Tab A.) The territorial sea is a maritime zone adjacent to the coast over which the United States exercises sovereignty and jurisdiction, including its airspace, seabed and subsoil. The President declared that, consistent with international law, the U.S. will grant the ships of all countries the right of innocent passage through the territorial sea and transit passage through any international straits. (Tab B is a description of the various maritime zones a nation is allowed under international law.)

Reasons for Issuance of the Proclamation

The President stated that the reason for the Proclamation was to advance the national security interest of the United States. According to press releases, the extension was motivated partly by the desire to keep Soviet intelligence gathering vessels nine miles farther from the U.S. shoreline. The initiative had been recommended by the Defense Department.

International Custom

The assertion of a 12-mile territorial sea is consistent with the growing practice of other nations. Some 104 nations now claim a 12-mile territorial sea. The Law of the Sea Convention also recognizes the right of a nation to assert a 12-mile territorial sea. The U.S. has not signed the Convention, but considers its provisions to be reflective of customary international law in most respects other than deep seabed mining.

Presidential Authority and Contiguous Zone

During the 100th Congress, the Merchant Marine and Fisheries Committee considered whether Congress should participate in the extension of the territorial sea by passing companion legislation. The Committee reported out, and the House passed, H.R. 5069, but the Senate did not act on the bill. As passed by the House, H.R. 5069 would have affirmed the Presidential extension of the territorial sea to 12 miles and the contiguous zone to 24 miles. It also would have frozen domestic law until a Commission could study the effect of these maritime extensions and make policy recommendations to Congress and the President on what changes, if any, were required in U.S. law.

The Administration originally had considered extending the contiguous zone of the United States from 12 to 24 nautical miles. However, the Justice Department advised the President that to do so would be inconsistent with current U.S. treaty obligations under the 1958 Geneva Convention on the Territorial Sea, which limits the breadth of the contiguous zone to 12 miles.

EFFECT ON EXISTING LAW

The Proclamation itself provides that nothing in the Proclamation extends or otherwise alters existing federal or state law. The President's intent was to extend the territorial sea for international and national security purposes only, but not to change any state or federal authority. Therefore, on its face, the Proclamation claims to have no legal effect on domestic law. Nonetheless, as the Justice Department legal opinion acknowledges, the question is not entirely free from doubt. Congress may have enacted statutes that are intended to be linked to the extent of the United States' territorial sea under international law. Therefore, to determine the effect of the Proclamation on any particular statute, one must examine its legislative intent.

Altogether, there are as many as 65 federal laws which use the phrase "territorial sea" as providing a limit to U.S. jurisdiction. A partial list of these laws is attached. (See Tab C.) Only a few of these laws establish a three-mile limit on the seaward extent of the territorial sea. Whether the effect of the Proclamation has been to extend the reach of these laws to 12 miles remains to be determined on a case-by-case basis.

One statute which does not define the phrase "territorial sea" is the Coastal Zone Management Act (CZMA). The CZMA provides that the coastal zone extends, in areas other than the Great Lakes, "seaward to the outer limit of the United States territorial sea". (Emphasis added.) The phrase, "United States territorial sea," is not further defined in the Act. The legislative history of the CZMA is not altogether clear, but suggests that further Congressional action would be needed before the zone could be extended. Coastal states may argue, however, in the context of consistency reviews of federally conducted and permitted activities in and affecting the coastal zone, that the coastal zone has been extended to 12 miles.

There are a number of other laws which, although they do not use the phrase "territorial sea," could be affected by the Presidential Proclamation as well. For instance, the basic law that grants states title to natural resources beyond their shoreline is the Submerged Lands Act (SLA, 43 U.S.C. 1301-1315). Enacted in 1953 to resolve the so-called "tidelands controversy," the SLA granted the states title to all natural resources seaward to three miles, except in the case of Texas and the West Coast of Florida where, because of their status on joining the Union, it extends three marine leagues (or nine miles). The states' Submerged Lands Act grant, limited by statute to three (or nine) miles, would not be affected by the Presidential Proclamation.

Since the states' Submerged Lands Act grant would not be affected by the Territorial Sea Proclamation, the inner boundary of the outer Continental Shelf (OCS) also would not be changed, unless Congress amended the outer Continental Shelf Lands Act (OCSLA, 43 U.S.C. 1331-1356). This is because the OCS includes all submerged lands lying seaward of the states' seaward boundary under the SLA. Therefore, the Secretary of the Interior would continue to have responsibility to manage all oil, gas and hard mineral resources between 3 and 12 miles.

Another resource statute of interest to this Committee is the Magnuson Fishery Conservation and Management Act (Magnuson Act, 16 U.S.C. 1801-1882). The Magnuson Act creates a system of eight regional fishery management councils to manage fishery resources of the OCS and Exclusive Economic Zone (EEZ). The Magnuson Act defines the inner boundary of its jurisdiction as coterminous with the seaward boundary of each of the coastal states. Again, absent Congressional action, this boundary would not change.

The Coast Guard also is affected by the Presidential Proclamation. The Coast Guard has authority to enforce U.S. laws on, under, and over the high seas and waters subject to the jurisdiction of the U.S. (including the territorial sea). The Coast Guard is the primary law enforcement agency on U.S. waters, and will enforce domestic law as it applies on those waters.

The Jones Act provides that no merchandise shall be transported by water between "points in the United States" in any vessel other than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the Untied States. The Committee may want to review whether transportation within the extended territorial sea is covered by the Jones Act and other cabotage laws, such as the Act of June 19, 1886, relating to the transportation of passengers in the coastwise trade.

While the Administration's position is that the Proclamation has not affected domestic law, some federal agencies already have relied on the Proclamation to extend their authorities. For example, the Federal Aviation Administration (FAA) recently promulgated final rules extending the applicability of federal aviation regulations in the airspace overlying the waters between 3 and 12 nautical miles from the U.S. coast. (54 Federal Register 264, January 4, 1989.)

STATE INTERESTS

Most coastal states are just beginning to evaluate the possible effects of the territorial sea extension and, to date, no clear consensus has emerged on what role, if any, the states should have in the extended territory.

Some states may be interested in having a greater say in the management of resources between 3 and 12 miles, and various state organizations have begun to take positions on the issue. For example, the Southern Governors' Association recently adopted a resolution urging that if the President extends the territorial sea for international purposes, state jurisdiction should be extended to 12 miles "for the specific purpose of regulating shipboard waste disposal". And, at its 1988 annual meeting, the Western Legislative Conference resolved that in the event of a Presidential Proclamation, Pacific States and Pacific Island Governments should participate in the management of an extended territorial sea and contiguous zone.

NECESSITY FOR IMPLEMENTING LEGISLATION

Congress has the exclusive constitutional responsibility under the Property Clause of the Constitution, Article IV, Section 3, Cl. 2, to provide for the disposition of newly acquired territory. The land between 3 and 12 miles has this status now that the President has asserted sovereignty over it. It is up to Congress to decide how this new U.S. territory should be managed.

There are precedents to guide Congress' actions. In 1947, President Truman issued a proclamation asserting U.S. jurisdiction over the natural resources of the subsoil and seabed of the outer Continental Shelf. Subsequently, Congress, in 1953, enacted the SLA and the OCSLA to establish state and federal jurisdiction over these resources. Congress also played a significant role in the establishment of the 200-mile fishery conservation zone (FCZ), the predecessor to the EEZ, by passing the Magnuson Act in 1976. This Committee has taken an active role in developing legislation to implement the 1983 EEZ Proclamation by reporting H.R. 1260, the National Seabed Hard Minerals Act of 1988 (H. Rpt. 100-1103, Part 1) in the 100th Congress.

DESCRIPTION OF PENDING LEGISLATION

On March 14, 1989, Congressman Shumway, along with Representatives Davis, Fields, Herger, Saiki and Weldon, introduced H.R. 1405, a bill to affirm the Presidential Proclamation extending the U.S. territorial sea to 12 miles. The bill also specifically states that federal and state authority under domestic law "shall not be extended beyond its previous geographical limits by the extension of the territorial sea".

Congressman Shumway's Congressional Record statement, which accompanied the introduction of H.R. 1405, explains that under the terms of this bill the legal definition of the term "coastal zone," as contained in the Costal Zone Management Act, for example, remains the same after the President's Proclamation as it did prior to it, with a seaward limit of three miles from the shore. This is intended to be consistent with the intent of the President's Proclamation, which was issued for international purposes only, and which was not intended to alter domestic law.

OPTIONS FOR IMPLEMENTING LEGISLATION

Following are some of the options that Congress can pursue to implement the Territorial Sea Proclamation:

- Do nothing.
- Affirm the Proclamation and codify the status quo prior to the Proclamation (the Shumway bill).
- Establish a Commission or Committee to study the effect of the Proclamation, and report back to Congress

in one to two years.

- o Examine and amend, as needed, individual laws as they come up for reauthorization (e.g., CZMA, Magnuson Act).
- o Enact a comprehensive statute, such as the SLA, which extends state jurisdiction over all resources within 12 miles.
- o Enact a shared state-federal management regime for resources between 3 and 12 miles.

ISSUES

Following are some questions that arise as a result of the Territorial Sea Proclamation:

- o What effect, if any, does the Proclamation have on existing federal and state laws?
- o What national security benefits have or will be derived from the issuance of the Proclamation?
- o Is there a need for implementing legislation? If so, what form should that legislation take?
- o Do any federal agencies require additional enforcement powers as a result of the Proclamation?
- o Should the U.S. extend its contiguous zone to 24 miles and, if so, how?
- o What options exist for managing the resources between 3 and 12 miles?
- o What management scheme is in the best interest of the U.S.?
- o Are there any gaps in criminal jurisdiction if state authority is limited to three miles?

Attachments: Tab A--Proclamation
Tab B--Maritime Zones
Tab C--Laws potentially affected by Territorial Sea Proclamation

Tab 4

Federal Register
Vol. 54, No. 5
Monday, January 9, 1989

Presidential Documents

Title 3—

The President

Proclamation 5928 of December 27, 1988

Territorial Sea of the United States of America

By the President of the United States of America

A Proclamation

International law recognizes that coastal nations may exercise sovereignty and jurisdiction over their territorial seas.

The territorial sea of the United States is a maritime zone extending beyond the land territory and internal waters of the United States over which the United States exercises sovereignty and jurisdiction, a sovereignty and jurisdiction that extend to the airspace over the territorial sea, as well as to its bed and subsoil.

Extension of the territorial sea by the United States to the limits permitted by international law will advance the national security and other significant interests of the United States.

NOW, THEREFORE, I, RONALD REAGAN, by the authority vested in me as President by the Constitution of the United States of America, and in accordance with international law, do hereby proclaim the extension of the territorial sea of the United States of America, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, and any other territory or possession over which the United States exercises sovereignty.

The territorial sea of the United States henceforth extends to 12 nautical miles from the baselines of the United States determined in accordance with international law.

In accordance with international law, as reflected in the applicable provisions of the 1982 United Nations Convention on the Law of the Sea, within the territorial sea of the United States, the ships of all countries enjoy the right of innocent passage and the ships and aircraft of all countries enjoy the right of transit passage through international straits.

Nothing in this Proclamation:

(a) extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom; or

(b) impairs the determination, in accordance with international law, of any maritime boundary of the United States with a foreign jurisdiction.

IN WITNESS WHEREOF, I have hereunto set my hand this 27th day of December, in the year of our Lord nineteen hundred and eighty-eight, and of the Independence of the United States of America the two hundred and thirteenth.

Ronald Reagan

[FR Doc. 89-512
Filed 1-6-89; 10:52 am]
Billing code 3195-01-M

TAB B

MARITIME ZONES

Territorial Sea

A belt of sea that may not exceed 12 nautical miles, measured from a baseline that is either the low-water line along the coast or the seaward limit of the internal waters of the coastal nation. The coastal nation exercises complete sovereignty in the territorial sea, subject to the right of innocent passage for foreign (commercial and military) vessels.

Contiguous Zone

A belt of sea contiguous to the territorial sea, which may not extend beyond 24 nautical miles from the baseline from which the breadth of the territorial sea is measured. Within the contiguous zone, a nation may protect itself against infringements of its customs, fiscal, immigration, or sanitary regulations committed within its territory or territorial sea. The coastal nation may stop a foreign ship in its contiguous zone for the purpose of investigation or arrest in connection with any infringement of the above-mentioned regulations, and may impose punishment.

Continental Shelf

The seabed and subsoil of the submarine areas that extend beyond the territorial sea throughout the natural prolongation of the nation's land territory to the outer edge of the continental margin, or to a distance of 200 miles from the baseline from which the breadth of the territorial sea is measured. In its continental shelf, a nation exercises sovereignty only for the purpose of exploring and exploiting its natural resources, both living and non-living.

Exclusive Economic Zone

A belt of sea beyond the territorial sea that may not exceed 200 nautical miles from the baseline from which the breadth of the territorial sea is measured. Within the EEZ, a nation has sovereign rights for the purpose of exploring and exploiting, conserving and managing its natural resources, living or non-living, as well as with regard to other activities for economic exploitation and exploration, such as the production of energy from the water, currents and winds.

TAB C

Partial List of Laws

Atlantic Tuna Convention, at 16 U.S.C. 971, 972

United States Fishery Zone , at 16 U.S.C. 1091
Marine Mammal Protection Act, at 16 U.S.C. 1362
Coastal Zone Management Act, at 16 U.S.C. 1451, 1453, 1456(A)
Endangered Species Act, at 16 U.S.C. 1538
Fishery Conservation and Management Act, at 16 U.S.C. 1802, 1811, 1812, 1822, 1829, 1851, 1856
Salmon and Steelhead Conservation and Enhancement Act, at 16 U.S.C. 3302
North Atlantic Salmon Fishing Act, at 16 U.S.C. 3606
Tariff Act of 1930, at 19 U.S.C. 1401, 1590
Protection of Vessels on the High Seas, at 22 U.S.C. 1971, 1972
International Narcotics Control Act, at 22 U.S.C. 2291
Deep Seabed Hard Mineral Resources Act, at 30 U.S.C. 1403
Navigation Rules for Inland Waters, 33 U.S.C. 191
Sea Grant Act, at 33 U.S.C. 1122
Ports and Waterways Safety Act, at 33 U.S.C. 1223
Clean Water Act, at 33 U.S.C. 1311, 1321, 1343, 1344, 1362
Ocean Dumping Act, at 33 U.S.C. 1401, 1402, 1411, 1416
Deepwater Ports Act, at 33 U.S.C. 1502, 1518
International Regulations for Preventing Collisions at Sea, at 33 U.S.C. 1601
Ocean Pollution Research and Development and Monitoring Act, at 33 U.S.C. 1702
Ocean Thermal Energy Conversion Act, at 42 U.S.C. 9101, 9102, 9111, 9119, 9163
Comprehensive Environmental Response, Compensation and Liability Act, at 42 U.S.C. 9601, 9611
Outer Continental Shelf Lands Act, at 43 U.S.C. 1331, 1811, 1813
Vessels and Seamen Act, at 46 U.S.C. 2101, 12108 appx
Drug Abuse Prevention on Board Vessels, at 46 U.S.C. 1902

Territories and Insular Possessions, at 48 U.S.C. 1681
Independent Safety Board Act of 1974, at 49 U.S.C. Appx 1903

The "Jones Act," 46 App. U.S.C. 883
The Act of June 19, 1886, 46 App. U.S.C. 289

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March 16, 1989

TO : Committee on Merchant Marine and Fisheries
Attention: Joan Bondareff

FROM : American Law Division

SUBJECT : Effect of Territorial Sea Extension on Selected Domestic Law

This responds to the Committee's request for analysis of 1), the impact on selected domestic laws (the Submerged Lands Act, the Outer Continental Shelf Lands Act, the Coastal Zone Management Act, and the Magnuson Fisheries Conservation and Management Act) of Proclamation 5928,[1] by which the President extended from 3 miles to 12 nautical miles the territorial sea of the United States, and 2), for a listing of other federal statutes using the term "territorial sea."

The Proclamation itself purports to extend the territorial sea for purposes of exercising sovereignty and jurisdiction under recognized principles of international law, and disclaims any intent to "extend or otherwise alter Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom." It had previously been asserted that a territorial sea extension "does not [by] itself give rights in the additional zone to the adjacent States."[2] Nonetheless, the effect on existing federal statutes depends upon interpretation of each individual statute, the basic question being whether its scope or application is made dependent upon the current definition of the territorial sea.[3]

Submerged Lands Act and Outer Continental Shelf Lands Act

The Submerged Lands Act (SLA) and the Outer Continental Shelf Lands Act (OCSLA) are companion laws delimiting respective state and federal jurisdiction and control over offshore lands and resources. Neither statute hinges this jurisdiction on the term "territorial sea," and neither statute is significantly affected by the Proclamation extending the territorial sea.

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[1] 54 Fed. Reg. 777 (1989).

[2] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 512 reporters' note 3 (1986).

[3] The Supreme Court has already suggested in dictum that extension of the territorial sea may affect interpretation of domestic legislation. *See* Argentine Republic v. Amerada Hess Shipping Corp., 57 U.S.L.W. 4121, 4125 n.8 (1989).

The Submerged Lands Act represented final resolution of the "tidelands controversy." The dispute over ownership and control over offshore resources had come to a head in 1947, when the Supreme Court determined in *United States v. California*[4] that California did not own the three-mile marginal belt along its coast, but that instead the Federal Government had paramount rights in and power over that belt. With enactment of the SLA in 1953, Congress then granted these lands to the states. The basic resolution was that state boundaries and corresponding jurisdiction over oil and gas resources extend three geographical miles seaward from their coasts (or up to three marine leagues in the Gulf of Mexico), and that the Federal Government has dominion and control over lands and resources lying outside of state boundaries. These state-owned lands are "lands beneath navigable waters" under the terms of the Submerged Lands Act, and are sometimes called submerged lands. The federally controlled lands outside state boundaries constitute the "outer Continental Shelf" under the terms of the Outer Continental Shelf Lands Act of 1953.

"Lands beneath navigable waters" are defined by the SLA as including offshore waters up to the mean high tide line and extending seaward from the "coast line" (defined as the low water line or the line marking the seaward limit of inland waters) for three geographical miles or, in the case of Gulf of Mexico states whose historic boundaries extended beyond three miles, up to three marine leagues.[5] Lands and resources lying outside these state-owned "lands beneath navigable waters" were expressly reserved to the United States.[6] The "outer Continental Shelf" is defined by the OCSLA as "all submerged lands lying seaward and outside of the area of lands beneath navigable waters [as defined by the SLA] and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control."[7] Neither of these definitions is in any way contingent upon the extent of the "territorial sea," hence the federal/state jurisdiction delimited by the two laws is unaffected by the Proclamation.[8]

That the domestic law concept "lands beneath navigable waters" is separate and distinct from the international law concept of the "territorial sea" was underscored by the Supreme Court's resolution of claims by Gulf of Mexico states to seaward boundaries of three marine leagues. In rejecting the State Department's claim that "territorial claims of the states could not exceed those of the Nation," the Court concluded that Congress had the power to fix state offshore boundaries effective between state and nation, and that "a state territorial boundary beyond three miles is established for purposes of the Submerged Lands Act by Congressional action so fixing it, *irrespective of the limit of territorial waters*."[9]

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[4] 332 U.S. 19 (1947). Similar rulings were made in United States v. Louisiana, 339 U.S. 699 (1950); and United States v. Texas, 339 U.S. 707 (1950).

[5] 43 U.S.C. § 1301(a).

[6] SLA § 9, 43 U.S.C. § 1302.

[7] OCSLA § 2(a), 43 U.S.C. § 1331(a).

[8] The term "territorial sea" is used in the OCSLA in the definition of "coastal zone," added in 1978 along with provisions requiring coordination of exploration and development activities with state coastal zone programs. 43 U.S.C. § 1331(e). This definition is identical to the CZMA definition discussed below.

Coastal Zone Management Act

The Coastal Zone Management Act does tie the definition of the "coastal zone" to the "territorial sea." Additional inquiry is therefore necessary to determine whether this means the 3-mile territorial sea as it existed in 1972 when the CZMA was enacted, or whether the "coastal zone" expands as the territorial sea expands. Based on statutory structure and purposes and on legislative history, the better argument appears to be that expansion of the territorial sea does not expand the coastal zone. There are, however, some contrary indications in legislative history, and the matter is not free from doubt.

Language, Structure, and Purpose

The term "coastal zone" is defined by CZMA § 304(1)[10] to extend in areas other than the Great Lakes "seaward to the outer limit of the United States territorial sea." The term "territorial sea" is not defined in the CZMA. Therefore, in order to determine the sense in which the term is used in the CZMA, it is necessary to examine the overall statutory scheme, the principal purposes of the legislation, and legislative history.

An initial inquiry is whether the term "territorial sea" is used elsewhere in the CZMA. As the Supreme Court has explained, "[s]tatutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme -- because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."[11] The term is used in the congressional findings section in a context that may shed light on the definition of coastal zone. One of ten "congressional findings" was that

> [n]ew and expanding demands for food, energy, minerals, defense needs, recreation, waste disposal, transportation, and industrial activities in the Great Lakes, territorial sea, and Outer Continental Shelf are placing stress on these areas and are creating the need for resolution of serious

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[9] United States v. Louisiana, 363 U.S. 1, 34, 36 (1960) (emphasis added) (holding that Texas was entitled to a seaward boundary of three marine leagues for purposes of the SLA, but that Louisiana, Mississippi, and Alabama were not).

[10] 16 U.S.C. § 1453(1).

[11] United Savings Ass'n v. Timbers of Inwood Forest Associates, 484 U.S. —, 98 L.Ed.2d 740, 748 (1988).

> conflicts among important and competing uses and values in coastal and ocean waters.[12]

This reference appears in a listing of areas comprising "coastal and ocean waters," where competing demands were seen as requiring some form of conflict resolution. Perhaps significant is the fact that, although there is a gap between the territorial sea and outer continental shelf lands in the Gulf of Mexico,[13] Congress nonetheless included the terms together in what was evidently intended to represent a comprehensive listing of coastal and ocean waters subject to the competing demands. Does imprecision or inadvertence in this context suggest the same in the context of the coastal zone definition?

The principal purpose of the CZMA was to assist and encourage states in exercising management control over lands and waters within their jurisdictions. This purpose is evident in the statement of congressional findings and in the congressional declaration of purpose. Among the findings are a declaration of "a national interest in the effective management, beneficial use, protection, and development of the coastal zone"; a statement that "present state and local institutional arrangements for planning and regulating land and water uses in [the coastal zone] are inadequate"; and the statement that

> [t]he key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone by assisting the states . . . in developing land and water use programs for the coastal zone . . . .

This finding was repeated as a "national policy":

> to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone . . . .

Also important is how the CZMA provides for coordination between state coastal zone planning and federal programs and activities. Jurisdiction over federal lands and waters is not relinquished to the states; indeed, the Act expressly disclaims any intent to alter federal or state jurisdiction over offshore lands and resources. Instead, federal agencies are directed to conform their activities, when they affect land and water uses in the coastal zone, to state programs. One of the CZMA's policies includes the encouragement of "participation and cooperation" by "Federal agencies having programs affecting the coastal zone;"[14] this is achieved through the "federal consistency" requirements of section 307. Various federally conducted or supported activities must "to the maximum extent practicable," be consistent with federally-approved state coastal zone management programs. Separate "consistency" requirements apply to activities conducted or supported by a federal agency and "directly affecting" the coastal zone, to federal development projects "in the coastal zone," and to issuance of federal licenses or permits to conduct activities "affecting" the coastal zone. Section 307 also includes a disclaimer that

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[12] CZMA § 302(f), 16 U.S.C. § 1451(f) (emphasis added).

[13] The term territorial sea, prior to the recent extension, was understood as referring to a three-mile belt. *See, e.g.*, Cunard S.S. Co. v. Mellon, 262 U.S. 100, 122 (1923); Clean Water Act § 502(8), 33 U.S.C. § 1362(8). As explained above, "outer Continental Shelf lands" are defined as lands outside of "lands beneath navigable waters" as defined in the Submerged Lands Act. "Lands beneath navigable waters" extend three marine leagues (approximately 9 miles) into the Gulf of Mexico off the Texas and Florida coasts. Thus, in those Gulf waters, there was a gap between the outer boundary of the territorial sea and the inner boundary of outer continental shelf lands.

> nothing in [the CZMA] shall be construed . . . to diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, *submerged lands*, or navigable waters.[15]

As the conferees explained this language, it "would make certain that there is no intent in this legislation to change Federal or State jurisdiction or rights in specified fields, including submerged lands."[16]

Given the principal purpose of assisting states in exercising management control within their own jurisdictions, given the approach to cooperative federalism reflected in the "consistency" provisions, given the express disclaimer of intent to alter federal or state jurisdiction, and given the imprecise use of the term "territorial sea" in the Act's findings section, it would have been anomalous for Congress to incorporate a definition of the coastal zone that would permit enlargement of state jurisdiction upon the occurrence of an event unrelated to coastal zone management -- the extension of the territorial sea for the purpose of exercising national sovereignty and jurisdiction under international law. Nonetheless, it is possible to construct a counterargument: Congress is presumed to have known the difference in meaning between "lands beneath navigable waters" as defined in the SLA and the "territorial sea," and its choice of the latter term can be given effect by recognizing a flexible definition of "coastal zone."

Legislative History

The legislative history of the definition of "coastal zone" is not clear-cut. The conference committee resolved a conflict between House and Senate definitions by adopting the House version, but by adding an explanation different from that given by the House Committee on Merchant Marine and Fisheries. The explanation contained in the conference committee's joint explanatory statement is fully consistent with the reading suggested above from the structure and purposes of the CZMA -- that Congress did not intend a flexible definition of coastal zone. Moreover, the conferees retained language added by the Senate to emphasize that the Act was not intended to change federal or state jurisdiction over submerged lands. On the other hand, the joint explanatory statement did not directly contradict the Merchant Marine Committee's explanation for the territorial sea reference -- an explanation explicitly favoring a flexible definition.

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[14] CZMA § 303(4), 16 U.S.C. § 1452(4).

[15] §307(e), 16 U.S.C. § 1456(e) (emphasis added).

[16] H.R. Rep. No. 1544, 92d Cong., 2d Sess. 14 (1972).

Senate action on the bill preceded House action, and is discussed first. The bill reported by the Senate Commerce Committee contained a definition of the outer reach of the coastal zone virtually identical to the enacted version: "the zone . . . extends seaward to the outer limit of the United States territorial sea."[17] The Committee explained that "[t]he outer limit of the zone is the outer limit of the territorial sea, beyond which the States have no clear authority to act."[18] This suggests an intent to limit the definition of coastal zone to the areas over which states could exercise jurisdiction, although there is no explanation as to why the more precise term "lands beneath navigable waters" was not borrowed from the Submerged Lands Act.

During floor debate in the Senate, the outer limit of the coastal zone did receive attention, and the bill was amended to clarify the definition. The amendment, introduced by Senator Spong, qualified the reference to the territorial sea by providing that the coastal zone "shall not extend beyond limits of State jurisdiction" recognized by the Submerged Lands Act. As amended, and as passed by the Senate, the provision read as follows:

> The zone . . . extends seaward to the outer limit of the legally recognized territorial seas of the respective coastal States, but shall not extend beyond the limits of State jurisdiction as established by the Submerged Lands Act . . . and the Outer Continental Shelf Act.[19]

Two other changes to the bill were also effected by Senator Spong's amendment. Section 314 (corresponding to § 307 in the House bill and the enacted version) was amended to clarify that the Act as a whole was not intended to change or diminish federal or state jurisdiction. "Nothing in this *Act*" was substituted for "nothing in this *section*," and the term "submerged lands" was added to the listed jurisdictional areas. Under these changes, retained by the conference committee, the provision read

> Nothing in this *Act* shall be construed -- to diminish either Federal or State jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, *submerged lands* and navigable waters . . . .[20]

As explained to the Senate, these amendments were intended to serve two related purposes: to avoid any effect on the ongoing litigation by which original states were attempting to assert ownership of outer Continental shelf lands off their coasts,[21] and "to make certain that Federal jurisdiction was unimpaired beyond the 3-mile limit in the territorial sea."[22] As amplified by another Member (without dispute or further discussion), the amendment was intended to make clear that

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[17] S. Rep. No. 753, 92d Cong., 2d Sess. 47 (1972).

[18] Id. at 9.

[19] S. 3507, § 304(a). 118 CONG. REC. 14188 (1972).

[20] 118 CONG. REC. 14190 (1972) (emphasis added).

> this bill focuses on the territorial sea or the area that is within State jurisdiction, and preserves the Federal jurisdiction beyond, which is not to be considered or disturbed by the bill at this time. If we want to do something about that later, we will have another bill and another opportunity.[23]

As indicated, the Merchant Marine Committee's reported version of coastal zone management legislation contained the ultimately-enacted language defining the outer limit of the "coastal zone." Its explanation clearly favored an outer limit that would expand if the territorial sea were extended.

> [The zone] extends outward . . . in other areas bordering on the oceans, seas, gulfs, and sounds, to the outer limit of the territorial sea which, under the present posture of international law, means 3 miles from the base line from which the territorial sea of the United States is measured. Should the United States, by future action, either through international agreement or by unilateral action, extend the limits of the U.S. territorial sea further than the present limits, the coastal zone would likewise be expanded, at least to the extent that the expanded water area and the adjacent shore lands would strongly influence each other, consistent with the general definition first referred to above.[24]

The reported bill also contained the section 307(e) disclaimer of any intent to "diminish either Federal or state jurisdiction, responsibility, or rights." This version, however, by its terms applied only to the jurisdictional effect of section 307 and not to the jurisdictional effect of the entire act, hence the House report did not need to address how this disclaimer squared with its expandable definition of coastal zone.[25]

The definitional scope of the term "coastal zone" was neither changed nor discussed during House floor debate on the CZMA.

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[21] "The sole purpose . . . is to assure that the bill will have no prejudicial effect upon the litigation." 118 Cong. Rec. 14185 (remarks of Sen. Spong). The litigation was eventually resolved against the states in United States v. Maine, 420 U.S. 515 (1975).

[22] 118 CONG. REC. 14185 (remarks of Sen. Hollings).

[23] Id. (remarks of Sen. Moss).

[24] H.R. Rep. No. 1049, 92d Cong., 2d Sess. 13-14 (1972).

[25] The Committee's version of section 307(e) read "nothing in this *section* [containing the consistency requirements] shall be construed to diminish either Federal or state jurisdiction"; the Senate version read "nothing in this *Act*, and the enacted version "nothing in this *title*" (the entire CZMA).

The conference committee, therefore, was presented not only with similarly worded but differently explained definitions of the outer limit of the coastal zone, but also with different language governing the effect on federal and state jurisdictional responsibilities. The conference committee resolved these differences by adopting the House language on the outer reach of the coastal zone "because of its clarity and brevity,"[26] but by retaining the Senate language making it clear that federal jurisdiction over OCS lands would not be affected. The committee's "joint explanatory statement" amplified the importance of the retained Senate language.

> The managers agreed to adopt the House language as to the seaward extent of the coastal zone, because of its clarity and brevity. At the same time, it should be made clear that the provisions of this definition are not in any way intended to affect the litigation now pending between the United States and the Atlantic coastal states as to the extent of state jurisdiction. Nor does the seaward limit of the coastal zone in any way change the state or Federal interests in resources of the territorial waters or Continental Shelf, as provided for in the Submerged Lands Act and the Outer Continental Shelf Lands Act. The Conferees also adopted the Senate language in this section which made it clear that Federal lands are not included within a state's coastal zone. As to the use of such lands which would affect a state's coastal zone, the provisions of section 307(c) would apply.[27]

Similarly, in explaining section 307(e), the managers stated that they had "adopted language which would make certain that there is no intent in this legislation to change Federal or state jurisdiction or rights in specified fields, including submerged lands."[28]

Thus, it can be seen, the conference committee did not merely accept the House language defining the outer limit of the "coastal zone" while substituting the Senate's understanding of the definition; in addition, the committee accepted Senate bill language clarifying the intent that federal and state jurisdiction over "submerged lands" was to remain unchanged. This incorporation of Senate bill language, as explained by the conferees, is indication that a flexible definition of coastal zone, expandable upon extension of the territorial sea, was not intended.

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[26] The managers did not elaborate on this point, but it is evident that the Senate definition lacked clarity insofar as it referred to "territorial seas *of the respective coastal States*." The correct reference is to the territorial sea of the United States.

[27] H.R. Rep. No. 1544, 92d Cong., 2d Sess. 12 (1972) (joint explanatory statement).

[28] Id. at 14.

The conference report was agreed to in both House and Senate without discussion of the conference committee's action on the definition of "coastal zone."[29]

Supreme Court Interpretation

The Supreme Court examined the scope and history of the CZMA in detail in *Secretary of the Interior v. California*.[30] Its holding that OCS oil and gas lease sales do not "directly affect" the coastal zone within the meaning of § 307(c)(1) was based in large part on its conclusion that "[e]very time it faced the issue in the CZMA debates, Congress deliberately and systematically insisted that no part of CZMA was to reach beyond the 3-mile territorial limit."[31] Even if the Court might have drawn different inferences with respect to application of the consistency provision,[32] its conclusion as to Congress' deliberate and systematic insistence on excluding OCS activities from the zone necessarily implicates the definition of the coastal zone. A holding that Congress incorporated a flexible definition under which the zone could expand into the federal OCS with extension of the territorial sea would be in direct conflict with the Court's generalization. Moreover, extension of the coastal zone into OCS waters might, one way or another,[33] subject federal OCS leasing activities to state coastal zone management controls -- the precise result the Court determined that Congress had rejected.

Summary

When viewed in isolation, the definition of the outer limits of the "coastal zone" as extending "seaward to the outer limits of the United States territorial sea" could well be read as allowing extension of the coastal zone with extension of the territorial sea. The House Merchant Marine Committee intended such a flexible definition when it reported its CZMA bill, and its report demonstrates that Congress was aware of the possibility of territorial sea extension. That Congress keyed the definition to the term "territorial sea" rather than to the term delimiting areas subject to state jurisdiction -- "lands beneath navigable waters" as defined in the Submerged Lands Act -- suggests an intentional choice of a flexible definition. Nonetheless, this interpretation seems outweighed by other considerations pointing to incorporation of the 3-mile territorial sea in effect in 1972 when the CZMA was enacted.

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[29] Senate approval followed a brief statement by Senator Hollings noting that the House had agreed to placing administrative responsibility in NOAA rather than in the Department of the Interior. 118 CONG. REC. 35459 (1972). House consideration entailed some debate, mostly on the same matter. Rep. Anderson, expressing regret at deletion of his amendment requiring federal protection in areas immediately outside state marine sanctuaries, did acknowledge that "the Federal Government has jurisdiction outside the State area, from 3 to 12 miles," but there was no further mention of federal/state jurisdictional issues. *See* 118 CONG. REC. 35547-50.

[30] 464 U.S. 312 (1984).

[31] 464 U.S. at 324. After cataloging numerous floor statements to that effect, the Court also pointed to the "Conference Committee's . . . systematic rejection of every other attempt to extend the reach of CZMA to the OCS." Id. at 330.

[32] Justice Stevens and three other dissenters argued, in effect, that the systematic limitation of coastal zone boundaries had been counterbalanced by consistency requirements intentionally drawn to prevent federal activities *outside* the zone from frustrating state management *within* the zone. 464 U.S. at 344, 352-55.

[33] Arguably, federal OCS lands would fall within § 304(1)'s exclusion from the coastal zone of "lands the use of which is by law subject solely to the discretion of . . . the Federal Government," and § 307(c)(1)'s consistency requirement would thereby be implicated.

An inflexible definition of the coastal zone's outer limit is most consistent with the remainder of the CZMA. The principal purpose of the CZMA was to assist states in managing coastal resources within their own jurisdictions, and any intent to diminish state or federal jurisdiction over "submerged lands" and other resources was expressly disclaimed. And, while the conference committee selected the House-passed definition of coastal zone for its "clarity and brevity," at the same time it accepted Senate language clarifying intent that the coastal zone not intrude into areas of federal jurisdiction and explained the definition in a manner implicitly rejecting the House interpretation. Finally, the Supreme Court's reading of the legislative history of the CZMA as reflecting a clear congressional determination that "no part of CZMA was to reach beyond the 3-mile territorial limit" seemingly forecloses an interpretation that would require extension of the coastal zone into the federal OCS.

Fisheries Conservation and Management Act

Under 1986 amendments to the Magnuson Fisheries Conservation and Management Act ("Magnuson Act"),[34] the United States asserts authority to manage offshore fisheries within the Exclusive Economic Zone (EEZ). For purposes of the Act, "Exclusive Economic Zone" is defined in a manner that is independent of the breadth of the territorial sea. The Proclamation extending the territorial sea therefore has no direct bearing on Magnuson Act jurisdiction. However, there remain in the Act several references to "territorial sea."

Under section 101 of the Magnuson Act as amended in 1986, "the United States claims . . . sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone."[35] The term "exclusive economic zone" is defined for purposes of the Act as "the zone established by" Proclamation No. 5030, except that "the inner boundary of that zone is a line coterminous with the seaward boundary of each of the coastal states."[36] Previously, the Act had defined a "fishery conservation zone" that was "contiguous to the territorial sea" but that had an inner boundary "coterminous with the seaward boundary of each of the coastal States."[37] This confusing reference to the territorial sea has been eliminated, and along with it the need to consider the effect of the territorial sea extension on the boundaries of the zone. Section 306(a) of the Act, providing that the Act shall not be construed "as extending or diminishing the jurisdiction or authority of any State within its boundaries" except as preemption was expressly authorized to protect fisheries within the zone, was left unchanged.[38]

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[34] 16 U.S.C. §§1801-82.

[35] 16 U.S.C. § 1811(a).

[36] 16 U.S.C. § 1802(6).

[37] Act § 101, formerly 16 U.S.C. § 1811.

One reference to "territorial sea" not yet eliminated may cause some confusion, however. The term "Continental Shelf" remains defined as "the seabed and subsoil of the submarine areas adjacent to the coast, but outside the area of the territorial sea. . . ."[39] Despite the amendments defining Magnuson Act jurisdiction in relation to the EEZ, the term "Continental Shelf" remains operative in the Act because of its function in defining "Continental Shelf fishery resources." That latter term is defined by a listing of species, but with possible addition of sedentary species determined by the Secretary of Commerce to be "immobile on or under the seabed, or able to move only in contact with the seabed or subsoil of the Continental Shelf."[40] Moreover, United States jurisdiction under the Act is asserted "over all fish, and all Continental Shelf fishery resources within the [EEZ]." Because the definition of "Continental Shelf fishery resources" was changed in 1986 (technical corrections were made to the listing of species) without change to its scope, it cannot automatically be assumed that Congress' continuing references to "Continental Shelf" and to "territorial sea" are inadvertent.[41] Thus, if there is occasion to exercise this authority to list additional "sedentary" species, it is possible that the distinction between "Continental Shelf" and EEZ may be important, and it is therefore possible that the Secretary would have to determine whether Congress adopted a flexible use of the term "territorial sea."

Listing of References to "Territorial Sea" in U.S. Code

A computer search reveals the following references to the term "territorial sea" in the *United States Code*. Note that references may pick up such terms as the "Convention on the *Territorial Sea* and the Contiguous Zone" without independent occurrence of the term "territorial sea." References are listed by *Code* section number, hence there are multiple listings for some statutes. Short titles or other identification are listed in the right column.

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[38] 16 U.S.C. § 1856. Subsection (b) of that section, specifying permissible grounds for preemption, was amended to change its references from effects on fishery management within the fishery conservation zone to effects on management within the EEZ.

[39] 16 U.S.C. § 1802(3).

[40] 16 U.S.C. § 1802(4).

[41] Note as well that the need to alter the definition of "fishery conservation zone" to eliminate the reference to "territorial sea" was acknowledged by the Merchant Marine Committee in explaining its new definition of the EEZ. *See* H.R. Rep. No. 165, 99th Cong., 1st Sess. 15 (1985).

16 U.S.C. §§ 971, 971c	Atlantic Tunas Convention Act
16 U.S.C. § 972	Eastern Pacific Tuna Licensing Act
16 U.S.C. § 1362	Marine Mammal Protection Act
16 U.S.C. §§ 1451, 1453, 1456a	Coastal Zone Management Act
16 U.S.C. § 1538	Endangered Species Act
16 U.S.C. §§ 1802, 1811, 1822, 1825, 1856	Fisheries Conservation and Management Act
16 U.S.C. § 3302	Salmon and Steelhead Conservation and Enhancement
16 U.S.C. § 3606	Atlantic Salmon Convention Act
19 U.S.C. § 1401	Customs, definition of "hovering vessel"
19 U.S.C. § 1590	Aviation smuggling
22 U.S.C. § 2291	International narcotics control
22 U.S.C. 2373	Eastern Mediterranean policy requirements
26 U.S.C. § 4496	Tax, deep seabed hard minerals
30 U.S.C. § 1403	Deep Seabed Hard Mineral Resources Act
33 U.S.C. § 151	High seas and inland waters demarcation lines
33 U.S.C. § 1122	National Sea Grant College Program
33 U.S.C. § 1223	Ports and Waterways Safety Act
33 U.S.C. §§ 1311, 1321, 1343, 1344, 1362	Clean Water Act
33 U.S.C. §§ 1401, 1401, 1411, 1416	Ocean Dumping Act
33 U.S.C. §§ 1502, 1518	Deepwater Port Act
33 U.S.C. § 1601	International Navigational Rules Act
33 U.S.C. § 1702	National Ocean Pollution Planning Act
42 U.S.C. §§ 9101, 9102, 9111, 9119 9163	Ocean Thermal Energy Conversion Act
42 U.S.C. §§ 9601, 9611	Comprehensive Environmental Response, Compensation, and Liability Act
43 U.S.C. § 1331	Outer Continental Shelf Lands Act
43 U.S.C. §§ 1811, 1813	Offshore Oil Spill Pollution Fund
46 U.S.C. § 12108	Fishery licenses and registry
49 U.S.C. app. § 1903	National Transportation Safety Board

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March 16, 1989

TESTIMONY OF DR. ERNEST CARL, DEPUTY SECRETARY, NORTH CAROLINA DEPARTMENT OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT, BEFORE HOUSE SUBCOMMITTEE ON OCEANOGRAPHY AND GREAT LAKES, MARCH 21, 1989.

On behalf of the State of North Carolina, I appreciate the opportunity to comment on the expansion of the territorial sea from three to twelve miles. National ocean policy including extension of the territorial sea has a significant impact on our State and other coastal states. Our coastal resources are affected by activities that take place off of our shores. This cause and affect relationship exists whether we are talking about three miles, twelve miles, or fifty miles. Therefore, we feel it is important that the Legislative and Executive Branches work with the affected states to define and refine ocean and coastal policies.

North Carolina has more than 300 miles of oceanfront along its barrier islands, 4,000 miles of estuarine shoreline and a 2.2 million-acre estuarine system that is the third largest in the nation. We have strong commercial and recreational fisheries which are vital to the State's economy. In 1987 the reported commercial landings had a dockside value of over 65 million dollars. The dollar value of recreational fishing is harder to measure, but certainly exceeds 70 million dollars per year. We have a clear history of protecting the ecosystem which supports this fishery and, for some species, the fishery of much of the Atlantic Coast. It is these natural resources that draw visitors to our coastal area. Protection of these resources is a priority in North Carolina and it is important that federal policies support our protection efforts.

President Reagan's Proclamation of December 27, 1988, extending the United States Territorial Sea is consistent with international laws. Extending the territorial sea to twelve miles makes sense for security and international matters. The extension also makes sense for natural resource protection purposes. However, it raises jurisdictional questions between the states and the federal government on a number of domestic issues. A myriad of federal laws use different terms to describe coastal waters and to address domestic jurisdictional questions. This ambiguity could lead to confusion over the new "9 mile" grey zone. The states need to know exactly what new responsibilities they must assume to adequately protect our marine and coastal resources. There can be no gap in protection while jurisdiction is debated or challenged.

In our opinion, Congress must act to resolve the ambiguities in domestic law that have been raised by the presidential proclamation. In doing so, we believe that it should act in close partnership with the coastal states. For some activities, regulation by the states in the twelve-mile territorial sea is the only cost-effective alternative. For others, Federal regulations would be most effective and for a few some sort of Federal-State partnership, such as exists in fisheries management under the Magnusun Act, will result in the best use and protection. Each use must be assessed on its own merits if misuse and abuse are to be prevented. A single stroke, "one size fits all" approach is unthinkable.

In North Carolina we have not had time to analyze each and every facet of this complex problem. We would welcome the opportunity to participate in a joint effort to more thoroughly evaluate these questions. At this time our concerns center on four areas:

1. Ocean Pollution. North Carolina, like a number of other states, had medical waste wash ashore on several beaches last summer. In our case, the waste was traced back to Navy ships in our coastal waters. Governor James Martin, with the full cooperation of the Navy, moved quickly to clean up the beaches. Governor Martin also took immediate action to halt further dumping of waste into North Carolina's coastal waters. At that time, the Governor urged Congress and the President to extend state jurisdiction to control the disposal of medical and other dangerous waste into coastal waters to twelve miles.

There have been other limited cases where disposal beyond the three mile limit have caused pollution problems for fishermen and coastal communities. The enforcement of water quality and ocean dumping statutes must be strong enough to protect our resources. In many cases, I believe expansion of state jurisdiction in this area will result in more effective protection of our coastline. North Carolina is serious about this problem and would commit the resources necessary to prohibit improper waste disposal into our waters.

2. Coastal Management. In passing the Coastal Zone Management Act (CZMA), Congress specifically refused to define the seaward boundary of the "coastal zone" in terms of the three-mile limit of state boundaries found in other statutes and instead defined it by reference to the territorial sea without in turn specifying the extent of the territorial sea. There were two good reasons for this: first, actions taken at great distances often affect the shoreline and near-shore waters, and second, Congress even then was considering extension of the territorial sea to twelve miles. Following the Congressional lead, North Carolina's Coastal Area Management Act allows the outer limits of the Act's jurisdiction to be set by rule. This flexibility allows for sound natural resource management. We strongly recommend that Congress reject efforts to set precedent by placing a three-mile limit on state coastal zone management. Our Coastal Resources Commission will be considering extension of its coastal area jurisdiction to the twelve-mile limit at its next meeting.

The opportunity for state consistency review of federal or federally permitted activities in the three - twelve-mile area is of particular concern to North Carolina in view of the ocean pollution problems discussed earlier. In addition to the ocean pollution issue, we are anticipating that in the next several months Mobil Oil Corporation will be submitting a plan of exploration for oil and gas about forty-seven miles northeast of Cape Hatteras, North Carolina. The coastal consistency review is one of our strongest tools in evaluating the potential environment impacts of this proposal. There must be no doubt that consistency requirements apply to all activities that affect our coast.

3. Airspace Restriction. Over the past several years there has been nearly a half-dozen proposals to expand military airspace over our coastal region. The process to review these proposals has been controversial and has pointed out shortfalls in the current environmental review process used by the Federal Aviation Administration. We would oppose an automatic extension of special use airspace by the FAA. It is important that states participate in any decision that could affect the expansion of military air space and that current federal and state environmental statutes apply to any extension of the territorial sea. North Carolina has relied on the National Environmental Policy Act and the consistency requirements of the Coastal Zone Management Act to see that all military expansion activities are thoroughly evaluated to assess their environmental impact on our coastal resources. We need these safeguards.

4. Marine Fisheries. The prudent management of fisheries is of paramount importance to North Carolina as indicated earlier. The fact that many species of fish range across State boundaries and far out to sea was recognized in the Magnusun Act and a strong Federal-State cooperative management system was forged by that act. This system should not be upset without careful deliberation. The Magnusun Act is up for reauthorization in this Congress and we think those proceedings would be a better forum to debate changes in State jurisdiction. If action on this important issue goes forward ahead of Magnusun Act reauthorization we recommend that it contain flexible language which would allow a demarcation to be set in reauthorization.

This change in the U. S. Territorial Sea will not solve state and federal offshore managerial, regulatory or resource recovery conflicts. A number of critical questions must be answered. However, a new opportunity exists to forge a most effective federal-state partnership to manage and protect our marine and coastal resources. We look forward to working with you to identify areas where the State has the interest and capability to assume jurisdiction and management over the expanded territorial sea.

STATEMENT OF

CHRIS A. SHAFER
CHAIRMAN, COASTAL STATES ORGANIZATION

BEFORE THE

SUBCOMMITTEE ON OCEANOGRAPHY AND GREAT LAKES
HOUSE MERCHANT MARINE AND FISHERIES COMMITTEE

March 21, 1989

Mr. Chairman and Members of the Subcommittee, I am Chris A. Shafer, Chairman of the Coastal States Organization (CSO) and Chief of the Great Lakes Shoreland Section of the Michigan Department of Natural Resources. On behalf of CSO, a representative association of the Governors of the 35 coastal States, Commonwealths, and Territories (the coastal States), I appreciate the opportunity to present our views on the newly established 12 mile U.S. Territorial Sea, as well as H.R.1405, a bill to affirm and implement President Reagan's Proclamation #5928, issued December 27, 1988.

We believe that it is most timely for this Subcommittee to initiate hearings on this very important topic. Given the vastness of this new territorial sea, and the diverse interests in it, it is clear that the legal and policy questions raised by this action relate to the jurisdictions of many federal agencies and Congressional committees, as well as the interests, rights and responsibilities of coastal States. We welcome this opportunity to present our views at what we hope will be the first in a series of hearings to carefully review the complex and challenging aspects of the territorial sea extension.

Although the Territorial Sea Proclamation was anticipated since early last year, it has been less than three months since its issuance. In response, CSO, the Western Governors Association, the Western Legislative Conference, the Pacific Basin Development

Commission, and several individual States have initiated studies on the ramifications of the Territorial Sea Proclamation. These studies are not yet completed, however. Thus, it is not possible for the coastal States to present today a detailed, formal position on exactly how to legislatively implement the presidential proclamation. Nonetheless, we would like to share our views on some of the questions raised by the issuance of the proclamation, as well as some of the constitutional and historical perspectives on this topic. We would also appreciate the opportunity to submit for the hearing record or for the Subcommitee's information the territorial sea extension studies of the States as they are completed in the months ahead. These studies will form the basis of a comprehensive State policy on this matter, which is expected to be completed by the end of the Summer.

Congressional Action Required

The recent extension of the U.S. Territorial Sea present fundamental questions of law and policy to the U.S. Congress. Wit the Territorial Sea Proclamation, the United States has annexe roughly 180,000 square miles of new territory, an area approximatel the size of Texas. Within this tremendous area, the Nation now ha full sovereignty, limited only by those international right recognized in Proclamation #5928 for maritime and aeronautica navigation.

By exerting full sovereignty and jurisdiction, the Territorial Se Proclamation appears to make the full 12 mile territorial se "incorporated territory" of the United States, equal to th sovereignty and jurisdiction exerted over U.S. land. In other word this newly annexed area, including the seabed, water and airspace, the legal equivalent of U.S. land and the airspace above. Of cours the land of this tremendous new area is physically different than mos other territorial acquisitions of the United States. It is entirel submerged, and without any population. Nonetheless, the natural resources located in this zone are greatly exploited, and coastal States and their populations are heavily dependent upon how these resources are managed.

We believe that the extension of U.S. jurisdiction over the U.S. Territorial Sea, vis-a-vis other nations, solely by proclamation is within the constitutional foreign affairs power of the President. There is both historic and Supreme Court precedence for this. However, there are strong constitutional arguments that the extension of U.S. sovereignty requires congressional, not solely executive, action to affirm and implement authority over this new area.

The distinction between an extension of jurisdiction on the one hand, and sovereignty on the other, is that with sovereignty, the territorial sea is now considered as much a part of the United States as the original land and three-mile territorial sea of the Nation. The legislative branch, not the executive, holds the constitutional power over federal property. Thus, there are strong constitutional concerns that suggest that Congress must act to annex new territory into the Nation, or at the minimum, to legislatively affirm any presidential annexation.

The U.S. Department of Justice shares this position. In its October 4, 1988 Memorandum to the U.S. Department of State concerning "Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea" the Justice Department concludes that it is open to constitutional question whether the President can acquire territory acting alone. This position is also in accord with some constitutional scholars who have likewise concluded that Congress must act in order for the United States to acquire new territory.

In any event, regardless of whether Congress is constitutionally required to act, Congress should act.

Congressional Action Needed

In testimony last August, 1988, before this Subcommittee, we raised several troubling questions of interpretation of federal law that could arisen as a result of the proclamation. Now, with the issuance of Proclamation #5928, these questions remain unanswered. Without clear Congressional action, it is quite predictable that federal courts will be called upon to resolve conflicting interpretations. Further, Proclamation #5928 raises questions concerning the validity of its proviso that Federal and State law are not affected. Thus, in addition to the constitutional questions whether Congress **must** act, we believe that Congress **should** act.

Throughout the 50 titles of the Unites States Code, the term "territorial sea" is used over 70 times. Notably, however, to our best knowledge, only twice is this term defined as a 3 mile zone, in: the Comprehensive Environmetal Resources Compensation and Liability Act (CERCLA) [42 U.S.C. 9601(30)], and the Clean Water Act [33 U.S.C. 1362(8)]. In all other usages of the term no definition is provided. Thus, each time that the term is used, any person operating under, or relying upon, such legislation since the Proclamation will be confronted with the interpretational question of what is meant: a 3 mile, or 12 mile territorial sea. Further, the term "territorial sea" in turn defines other terms used throughout the U.S. Code, such as "high seas," "navigable waters," "continental shelf," "waters of the United States" and "in the United States." The federal tax code alone uses the phrase "in the United States" over 2,000 times. Is this nine mile wide belt "in the United States" for tax purposes?

It is obviously in the interest of good government for Congress to act to clarify this situation and avoid the interpretational problems, and litigation that will undoubtedly follow. One unfortunate result of such litigation will be delay and confusion which will only undermine the effectiveness of existing federal ocean law.

At the same time, although we believe that Congress should act, we find H.R. 1405 unacceptable in its present form. H.R. 1405 embraces the view that Congress intended, each and every time the term "territorial sea" is used, only a 3 mile zone without any consideration of a possible extension. In our view, H.R. 1405 takes the position that in none of the separate laws using this term did Congress ever take into account the likelihood that the U.S. Territorial Sea would be extended. That is a view that we cannot, at this time, accept.

During the 1960s, Congress considered extending the U.S. Territorial Sea to 12 miles on four separate occasions. Since the early 1970s, the United States participated in the United Nations Third Conference on the Law of the Sea (LOS). During the negotiations, the United States took the position that a 12 mile territorial sea was customary under international law, and should be so codified by the U.N. Convention. Congress held oversight hearings on the LOS Conference. These hearings included discussion of the U.S. negotiating position on the internationally recognized breadth of a nation's territorial sea. Congress was well informed of these ongoing international deliberations, and of the U.S. negotiating position. Thus, Congress has long been aware of the possibility that the seaward boundary of the territorial sea might be extended.

Given this history, it is clear that Congress was very aware that the United States could, at some time, extend its territorial sea from 3 to 12 miles. Indeed, the Defense Department was urging for this extension to be done as soon as possible. Thus, when the term "territorial sea," without further definition, has been used by Congress, it is difficult to conclude that Congress, in each and every usage of the term, meant only a 3 mile zone.

One prime example is the passage of the Coastal Zone Management Act (CZMA). When enacting the CZMA there was debate on whether to define the "coastal zone" in terms of the State's boundaries as codified in the Submerged Lands Act, or in terms of the U.S. territorial sea. Bills were introduced defining the term "coastal zone" both ways. However, in the end, the CZMA, as signed into law, defines the coastal zone as extending to the seaward boundary of the territorial sea. The legislative history of the CZMA clearly indicates that Congress considered the question of whether an expansion of the territorial sea would affect an expansion of the coastal zone, and concluded that if the United States did extend its territorial sea from 3 to 12 miles "the coastal zone would likewise be expanded."

We do not accept the premise that Congress intended all laws using the term "territorial sea" to be fixed to the three mile zone. Congress has shown that when it desires to limit the reach of legislation, such as the Clean Water Act or CERCLA, it is fully capable of doing so. We strongly believe that Congress meant, in certain laws such as the CZMA, for the term to be a flexible one, able to fit the new situation of an expanded territorial sea if and when the U.S. made such a move. For this reason, we can not support H.R.1405 in its present form.

For the same reason, we must also question the legal validity of the Proclamation's proviso that:

> "Nothing in this Proclamation: (a) extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom."

If it was the intent of Congress to extend the scope of a statute with the extension of the U.S. Territorial Sea, then it is not within the power of a President to override Congress by a proclamation. This proviso, however, attempts to do precisely that.

We must also point out that this proviso of Proclamation #5928 is contrary to the approach taken by the Justice Department. In its October 4, 1988 memorandum on the subject, the Justice Department states that difficulties arise in determining the effect of the Proclamation on the 70 or more statutes where Congress uses the term "territorial sea" without further definition. "A determination of congressional intent in these circumstances will therefore require further inquiry into the purpose and structure of a particular statute ..." Thus, the Justice Department advises a statute-by-statute approach, while remaining open to the possibility that "Congress, may, however, have enacted statutes that are intended to be linked to the extent of the United States' territorial sea under international law."

In contrast, this proviso in the Proclamation forecloses the possibility that Congress intended certain statutes to track a territorial sea extension. The Justice Department never made this conclusion, and indeed expressly states that Congress may have intended for certain statutes to be linked to the U.S. assertion of a broader territorial sea. The Justice memorandum concludes that "The statutes potentially affected by the proclamation are too numerous to consider individually in the time permitted." Thus, the President, in this proviso in the Proclamation, goes much further than the U.S. Department of Justice was willing to go without considerably more research and analysis.

Thus, it is unclear whether this proviso can prevent an extension of Federal or State agency jurisdiction under those statutes which expressly define such jurisdiction in terms of the "territorial sea" without further definition of the term. In fact, one federal agency has already expanded its scope of jurisdiction in reaction to the proclamation. The Federal Aviation Administration (FAA) recently extended its jurisdiction (1/4/89 Federal Register), as set forth in the Federal Aviation Act of 1958, from 3 to 12 miles. This Act provides that the FAA has jurisdiction over "navigable airspace" within the "United States." The term "United States" is defined as including the airspace above "territorial waters." Beyond the territorial waters, operators of U.S. registered aircraft are to comply with the rules for airspace above the "high seas." However, with the issuance of the proclamation, the FAA notes, "the area between 3 and 12 nautical miles will no longer be part of the high seas." In other words, this "area will neither be a part of the United States ... nor a part of the high seas."

As a result, the FAA concluded that it had to extend its own jurisdiction out to 12 miles in order to maintain a safe environment for aviation. This is certainly a legitimate reason, but nonetheless this action was done in clear conflict with the proviso in Proclamation #5928. Instead, the FAA based its action squarely on an Act of Congress, the Federal Avaiation Act of 1958.

It is our belief that it will only be a matter of time before many other federal and State agencies, similarly operating under statutes using the undefined term "territorial sea" will likewise expand their jurisdiction. When doing so they will have legal precedence for extending their jurisdictions out to the 12 mile mark as they encounter the same type of legal "twilight zone" that the FAA did. Following the FAA's lead, these agencies may likewise extend their jurisdiction, despite the fact that such an extension conflicts with the proviso in the Proclamation.

In summary, Congress should act to legislatively implement the Territorial Sea Proclamation. Congressional action is necessary if for no other reason than to avoid numerous interpretational problems that will undoubtedly result in prolonged litigation. At the same time, we cannot presently support H.R. 1405. There has been virtually no analysis of the entire body of federal law that may have been affected by a change in the term "territorial sea" and the resultant change in other associated terms, let alone a complete policy review. H.R. 1405 prematurely forecloses the question of congressional intent in all of the laws using the term "territorial sea."

Eventual Statehood for Federal Territory As Historical Precedence

Historical precedent, with few minor exceptions, holds that territory acquired by the federal government, whether by State cession, purchase, treaty, conquest or discovery, ultimately has been granted Statehood or a congressionally legislated form of local government.

In nearly all cases, newly acquired U.S. territory has eventually been granted Statehood, or incorporated into existing States, as was the case of the original 3 mile territorial sea. In those cases where territory has not been granted Statehood, almost without exception a local government has been established by Congress, whether it be a freely-associated State (the Marshall Islands, the Federated States of Micronesia), a Commonwealth (Commonwealth of the Northern Marianas, Commonwealth of Puerto Rico), a territory (Guam, Virgin Islands, American Samoa), a trust territory (Palau) or the Panama Canal Zone.

In only a few instances has federally acquired territory remained totally in federal hands. Midway, Johnston and Wake Islands are administered by the U.S. Department of Defense. These islands are exceptional because they are quite small, resources are not being developed on either island, and because they are of tremendous national security value. These cases are very different than the newly annexed 180,000 square miles of territorial sea. The United States also has jurisdiction over the islands of Navassa, Swan, Howland, Baker and Jarvis. These islands have the distinction of being brought within the territory of the United States because of their bird guano. None are inhabited, and indeed they are described as uninhabitable.

The fact that nearly all federally acquired territory eventually has been bestowed Statehood or local governmental rule follows from the constitutional design of the Nation. In only one instance does the Constitution provide authority to the Federal Government to hold both National and Local governmental powers -- the District of Columbia. The Federal Government is one of limited, enumerated powers, none of which provide for the Federal government to hold both governmental powers, except for the District. It is not even "necessary and proper" for the federal government to hold both governmental powers for this new territory.

This is not to say that the federal government is powerless to acquire new territory for the nation. There clearly is constitutional authority, affirmed by the U.S. Supreme Court, for the federal government to acquire, by various methods, new territory. However, historical precedence provides, and Supreme Court decisions infer, that this new territory should be held in trust for eventual Statehood, or for some form of Congressionally legislated local government.

This is in accord with President Reagan's Executive Order on Federalism. In this Executive Order, President Reagan sets forth the principles of federalism relied upon by the Founding Fathers. The President states that "In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual States. Uncertainties regarding the legitimate authority of the national government should be resolved against regulation at the national level."

As noted, with minor exception, federally acquired territory has been granted Statehood or a congressionally legislated form of local government. These exceptions are due to compelling national security interests, or bird guano. H.R. 1405, however, would codify a major exception to historical precedence, contrary to established principles of federalism. H.R. 1405 would codify that this new 180,000 square mile territory remain Stateless, without any comprehensive governing authority. Why should this vast new area be a major exception to historical precedence, principles of federalism, and the constitutional design of the Nation?

State Experience and Expertise in Ocean Resource Management

Since the founding of the Nation the coastal States have had wide ranging experience in managing the living and non-living resources of the adjoining oceans. Today, all states bordering the territorial sea have statutes governing mineral exploration and mining on State lands, including submerged lands within State jurisdiction. Ten states are currently participating with the Interior Department in joint federal-state task forces to examine the option for leasing where minerals of interest occur. Further, the Governors of American Samoa, Guam, the Commonwealth of Northern Marianas Islands and Hawaii have completed an assessment of the importance of the resources in the 200 mile Exclusive Economic Zone (EEZ) off their shores, and are in the process of establishing an EEZ Coordinating Council. For the last twelve years the coastal States have acted with the federal government and the private sector in managing the fisheries resources of the 200-mile fishery conservation zone created by the Magnuson Fishery Conservation and Management Act.

Some coastal States have long-standing laws for the development of oil and gas resources within their coastal and territorial waters. The coastal states also have long-standing expertise in a variety of pollution programs. Chief among these that directly affect ocean resources are municipal waste treatment, water pollution control, and dredged material disposal. A number of coastal states have developed coastal or ocean sanctuary programs to protect sensitive habitats within their jurisdictions. Twenty nine States, and possibly 30 by next year, have federally approved coastal zone management programs. Through these programs States participate in the management of a wide variety of offshore resource activities conducted by private individuals, industry and the federal government. Historic shipwrecks have been managed by many coastal States for years, and under the Historic Shipwreck Act of 1988 all coastal States are now managing these "national treasures."

Several states have developed specific ocean resource policy or management initiatives. For example, North Carolina in 1984 completed a comprehensive ocean policy analysis, and is presently preparing a report on the economic feasibility of mining phosphorite deposits on the continental shelf adjacent to the State. Oregon is in the midst of preparing an ocean resources management plan to be completed in the next two years. Hawaii has legislatively authorized an Ocean Resources Management Council to oversee the preparation and implementation of an updated Ocean Resources Management Plan. Hawaii has also initiated a program to evaluate the potential impacts of a marine mining industry, and has prepared an environmental impact statement on ocean mining for the recovery of cobalt-rich manganese crusts off its shores. Legislation is pending in the legislatures of Alaska and California to inventory ocean resources and establish state ocean management programs.

Mr. Chairman, as a fellow citizen of a Great Lakes State you may very well share my sense of perspective on State competence for managing "ocean" resources. Since entering the Union the Great Lakes States have had exclusive management authority over extensive areas of water and submerged lands, and the aquatic resources found there. (See Figure 1) Those of us from the Great Lake States are not accustomed to dealing with the relatively short distance of 12 miles. As you probably know, the shortest State territorial water boundary is 21 miles offshore of Pennsylvania in Lake Erie. As for Michigan, the State manages our living and non-living aquatic resources out, in some locations, more than 72 miles to our boundary with Canada. Michigan alone owns 37,500 square miles of submerged lands.

Thus, from the perspective of the Great Lakes States, States can and have managed aquatic resources very successfully over areas extending far beyond 12 miles. Further, we have done so in concert with a foreign country. Today, the relations between Canada and the Great Lakes States are excellent, and the international institutions created by the Great Lakes States and Canada are testimony to our ability to manage our own resources.

CONCLUSION

Given their proximity to, and reliance on, the sea, and given th impact that management of these marine resources has on their economy an environment, the coastal States have direct and inherent interests rights and expertise pertaining to resources of the new 12 mil territorial sea. The coastal States are directly affected by, and ar experienced in, the management of the ocean resources off thei respec[illegible] shores which have now become adjacent "territory."

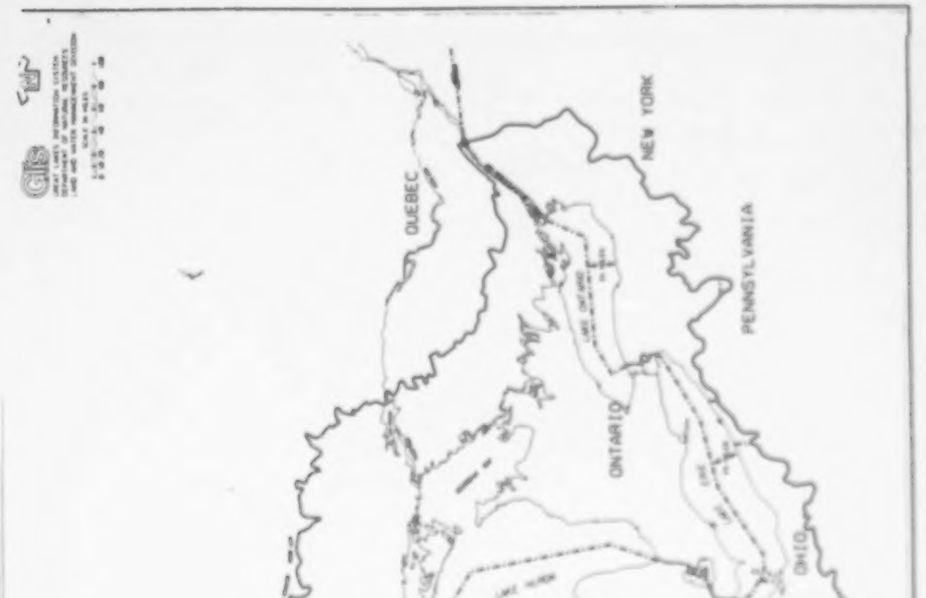
We believe that Congress must act on this issue. The incorporation o 180,000 square miles of new territory to the United States is simply to great a matter to be instituted by presidential proclamation alone Constitutional questions arise over whether a proclamation alone, withou congressional affirmation, is adequate to so incorporate this ne territory to the United States. Without congressional action, lega interpretational problems will abound, as indeed they have already arisen.

Given previous congressional attempts to expand the Territorial Sea and congressional awareness of the U.S. position at the LOS Conferenc where the United States supported an internationally recognized 12 mil territorial sea, the coastal States cannot accept, in general, tha Congress intended in each of the 70 or so usages of the term "territoria sea" in the United States Code, a permanent 3 mile zone. Mor specifically, given the legislative history, and the fact that Congres was quite aware that the United States may extend its territorial sea, w cannot accept that the term "coastal zone" as defined in the Coastal Zon Management Act is fixed to a three-mile zone.

For these reasons we cannot support H.R. 1405. This bill, in it present form, would foreclose, without any analysis or review, th question of whether Congress intended the undefined term "territoria sea" to mean only a three mile zone. Further, we question the validity of the proviso in the Proclamation which provides that federal and State law is unaffected by the Proclamation. A President lacks the authority to override congressional intent by means of a proclamation, and it is far from clear that in all cases, Congress meant only a three mile zone.

In view of historical precedence, the coastal States interests, rights and expertise in the management of these offshore resources, and constitutional principles, we believe that, at a minimum, the States should be equal managing partners over these resources, if not primary controllers over this new region. As a national organization of coastal States, we are prepared to work closely with Congress to develop legislation based on federalism and constitutional principles to ensure that the new 180,000 square mile area is governed and managed for the broadest and best public good for the Nation and the States.

I appreciate this opportunity to testify hear today on this very important subject. I will be glad to answer any question the members of this Subcommittee may have. Thank you.


GLIS
GREAT LAKES INFORMATION SYSTEM
DEPARTMENT OF NATURAL RESOURCES
LAND AND WATER MANAGEMENT DIVISION
SCALE IN MILES
MINNESOTA
WISCONSIN
ILLINOIS
INDIANA
MICHIGAN
OHIO
PENNSYLVANIA
NEW YORK
ONTARIO
QUEBEC
LAKE SUPERIOR
LAKE MICHIGAN
LAKE HURON
LAKE ERIE
LAKE ONTARIO

STATEMENT OF GARRY MAURO
PRESIDENT, WESTERN STATES LAND COMMISSIONERS ASSOCIATION

BEFORE THE SUBCOMMITTEE ON OCEANOGRAPHY
HOUSE COMMITTEE ON MERCHANT MARINE AND FISHERIES MARCH 21, 1989

Thank you, Mr. Chairman. As President of the Western State Land Commissioners Association, I take this opportunity to concu in and support the statement of Chris A. Shafer, Chairman of th Coastal States Organization.

The extension of the U. S. Territorial Sea from three to twelv miles is an important matter of concern to Texas and all wester coastal states. Any legal or policy changes concerning the Unite States' claim to and use of the ocean territory immediately beyon the shores of our coastal states directly affects our economy environment, and general welfare. Therefore, I endorse the cal for Congress to act to resolve the issues and uncertainties raise by the Presidential Proclamation of December 28, 1988 extendin the territorial sea. In establishing its course of action, it i exceedingly clear that Congress must consider the consequence this extension will have on the well-being of the affected state and territories.

I support the action of President Reagan in extending our territorial sea. It is a welcomed and valuable move toward strengthening our national security and our drug interdiction capabilities, while bringing the United States in line with international law. The proclamation is only the first step in this process. Specific issues and potential conflicts must be addressed by Congressional action in order to avoid the possibility of problems which could take years to resolve. Congress has the responsibility to act in order to avoid the otherwise time-consuming and costly process required for federal and state agencies to resolve these issues.

I believe Congress must conduct an analysis of the impacts and the benefits that may result from an extension of the territorial seas for both domestic and international purposes. This process should begin with Congressional hearings on the legal and policy issues involved. Thereafter, Congress should provide for resource and planning management that would enable coastal states and territories to offer assistance through their special competence in this area. Oceanic resources greatly impact the future of these states and territories.

Coastal states have vested interests in the oceans adjacent to their territories and have the expertise to manage and protect those interests. In Texas, for example, the problem of ocean dumping polluting the beaches resulted in efforts to designate the Gulf of Mexico as a Special Area under Annex V of the MARPOL treaty. Although national and international action has been required, the effort was initiated and spearheaded by the Texas General Land Office.

I also concur with Mr. Shafer's conclusion that the Shumway bill, H. B. ______, is not the solution to the problems raised by the proclamation. The Shumway bill further delays the creation of an effective management plan involving balanced federal and state management of our nation's oceanic resources and activities by ignoring those most affected by the extension of the territorial seas - the coastal states and territories.

In closing, while I support the extension of the territorial sea, I join in the call for Congressional action to resolve the legal and policy questions raised. The coastal states and territories are the primary recipients of the costs and benefits associated with the use of the ocean's resources available off their shores. In resolving these matters, Congress must consider the effects on the interests and the welfare of the coastal states and territories.

Thank you.

Testimony of Suzanne Iudicello
Before the
House Subcommittee on Oceanography and Great Lakes
March 21, 1989

Mr. Chairman and Members of the Subcommittee:

My name is Suzanne Iudicello. I am the Associate Director for Fisheries and the Environment in Alaska Governor Steve Cowper's Washington, D.C. office. Thank you for the opportunity to present the views of the State of Alaska on the Presidential Proclamation extending the United States territorial sea.

As a State with 6,640 miles of coastline--more than half of the entire United States coast--Alaska has a strong interest in the expansion of the territorial sea. Moreover, as a state whose ocean resources are critical to its economy, Alaska is concerned with the stewardship of those marine resources. The wholesale value of Alaska's commercial fishing industry exceeded $2 billion last year, and exports of fishery products were our largest source of income. But fishery resources are only the most obvious concern. The role the states will play in the nine miles of the expanded territorial sea will govern issues from environmental protection to community planning to resource development. Alaskans believe that role should be an active one, and we look forward to working with you to develop it.

Today, we would like to focus on four general areas, similar to the concerns expressed on behalf of the other coastal states by Mr. Shafer of the Coastal States Organization (CSO). Alaska is a member of CSO and we support their views. We do, however, appreciate the opportunity to elaborate on the Alaskan perspective on these issues.

Summary

First, the State of Alaska strongly supports Congressional action to resolve the many confusing legal and policy questions the Proclamation has raised. Second, it is our view that the vastness of this new area, the value of its abundant resources, and the scope and number of federal statutes delineating authority and jurisdiction over those resources merit more attention than one hearing by this committee. Third, H.R. 1405, which would freeze federal-state relationships in coastal waters despite expansion of the territorial sea, does not resolve federal-state relationships in a manner that is either realistic or satisfactory to coastal states. For that reason, the State of Alaska cannot support it. Finally, and most important, the State of Alaska believes that state jurisdiction and ownership over coastal waters should be extended to encompass the new 12 mile territorial sea. Such an extension will promote wise ocean stewardship.

Congress Should Clarify the Meaning of the Territorial Sea Expansion

Presidential Proclamation 5928, which extended the U.S. territorial sea from three to 12 miles, was signed to "advance national security and other significant interests of the United States." Although the Proclamation states that "nothing in this Proclamation extends or otherwise alters existing federal or state law or any jurisdiction, rights, legal interests or obligations derived therefrom," the matter is not so simply resolved.

While no one questions the President's authority to extend U.S. jurisdiction for foreign relations purposes, the Proclamation has raised the constitutional question of whether he may unilaterally acquire territory by an extension of sovereignty. Was the President's December 27 action an annexation of territory, and must Congress act in order for the United States to acquire the new area encompassed by the nine-mile expansion of the territorial sea? Legal scholars on both sides can, and likely will, debate these questions. Even the U.S. Department of Justice conceded, in its October 1988 Memorandum accompanying the Proclamation, that the domestic effect of the Proclamation on the relationship between the states and the federal government is not free from doubt.

As a matter of sound public policy, Alaska believes Congress should act to resolve questions of jurisdiction, sovereignty, and ownership over this new area. We encourage the members of this Committee to exert their leadership now, rather than wait for the expensive and time-consuming process of the litigation that undoubtedly will result without clear direction.

Jurisdictional Issues Raised by the Proclamation Merit Thorough Congressional Review

Not only is it important for Congress to act to answer basic questions about the national territorial effect of the proclamation, but action also is required to resolve the issues of jurisdiction over the conservation, management, and development of the myriad ocean resources in the three to 12 mile zone.

The term 'territorial sea' is used more than seventy times in the United States Code, in laws governing activity ranging from waterfowl hunting to smuggling. In the area of environmental protection alone, there are at least a half dozen statutes that define the territorial sea as three miles. Further, the Proclamation creates anomalies between those laws whose seaward jurisdictional limit is defined simply as the "territorial sea" and those in which it is expressly defined as three miles. For example, the Magnuson Fishery Conservation and Management Act (MFCMA) gives the federal government management authority over fishery resources out to 200 miles, and gives the states authority in their coastal waters. The so-called "inner boundary" of that federal management zone is defined in the Act as a line "coterminous with the seaward boundary of each of the coastal states." Thus, if a case can be made that the Proclamation affects a state's seaward boundaries, state fishery jurisdiction could be expanded.

The courts will be asked to clarify some of these interpretational problems if Congress does not act. Because the Proclamation leaves unanswered questions about effects on domestic law, and because the potential issues are so diverse, we recommend that Congress hold more than one hearing to fully consider these conflicts.

The Alaska Attorney General and the state's resource management agencies presently are analyzing in more detail the legal, economic, and policy issues that arise in the territorial sea area off Alaska. We hope such information will be useful in your deliberations and look forward to providing it to you in future hearings.

The State of Alaska Supports Legislation To Extend State Jurisdiction and Ownership Over Coastal Waters

One piece of legislation that proposes to resolve questions raised by the Proclamation is H.R. 1405. This bill would maintain the 'status-quo' (prior to the signing of the Proclamation) with respect to state-federal jurisdiction and law. It is the State of Alaska's view that not only would H.R. 1405 contravene the congressional intent underlying certain laws delineating authority in the territorial sea, but this bill also would foreclose an important opportunity for Congress to consider, as a matter of national policy, how resources in the three to 12 mile zone can best be managed.

For example, the Coastal Zone Management Act (CZMA) simply defines the coastal zone as "seaward to the outer limit of the United States Territorial Sea." Looking more closely at the legislative intent when the CZMA was adopted, Congress considered using both the definition 'territorial sea' and a more specific definition based upon the Submerged Lands Act. Legislative history suggests that a future expansion of the territorial sea was considered and that the flexible term 'territorial sea' was specifically chosen for that very reason. It thus appears that freezing all domestic law boundaries, as H.R. 1405 advocates, would be counter to the intent of the CZMA.

As this subcommittee and others in Congress consider implementation of the Proclamation, the State of Alaska strongly believes it is appropriate to extend state jurisdiction, which currently extends from the coastline to three miles, to include the entire 12 mile territorial sea. Further, the same arguments that can be made for extending this jurisdiction apply to granting state ownership as well. While we understand that a case can be made, based upon historical and constitutional precedent, that new U.S. territory must be held in trust and ultimately granted to the states, we would rather focus on congressional precedent, and the public policy reasons why Congress should grant Alaska and the other states jurisdiction and ownership over this zone.

Alaska has consistently demonstrated great competence in managing ocean resources, not only from the coastline out to three miles, but in the 200 mile exclusive economic zone (EEZ) as well. We are not unique in our ability to successfully manage large territorial seas and ocean areas. As you know, the Great Lake States routinely manage large coastal seas (11-80 miles), and some Gulf states currently have jurisdiction over nine or 12-mile state coastal waters. Alaska has a proven record showing experience and skill at balancing protection, conservation and utilization of the living and non-living resources in the zero to three mile ocean zone and beyond. We are better able, in terms of fiscal resources and administrative abilities, to manage these relatively nearshore fisheries, minerals, oil and gas, and other resources that are so close to our state borders.

For example, Alaska now manages a multi-billion dollar seafood industry which includes the world's largest salmon fisheries and several world class salmon runs. We already exclusively manage some fisheries in federal waters such as the shelf commercial rockfish fishery, king and tanner crab, and the troll salmon fishery. The State of Alaska spends $20 million dollars annually to manage its regional fisheries--ten times the federal government's expenditure to manage fisheries in the vast area of federal waters off Alaska's coasts. Further, the State has taken the lead in joint efforts with the U.S. State Department on reducing foreign interception of salmon and other living marine resources, and has years of experience in negotiating the harvest of anadromous species with other states and with foreign nations.

Alaska has had a successful offshore mining program since statehood. The State's program has provided minerals such as gold and platinum to industry while providing for environmental protection. State regulations and the coastal zone management program ensure that offshore mining leases go through strict review by all state resource agencies. In contrast to the federal government, which has never issued a single offshore mining lease off the coast of Alaska, there are currently nine active offshore leases which have been issued by the State and more than 200 offshore prospecting permits, giving Alaska the benefit of experience in this area.

Looking at oil and gas resources, the State also has a successful track record of evaluating oil and gas potential, completing timely permitting, and balancing complex interests such as subsistence whaling and oil development. The federal government currently takes an average of five years to plan an oil and gas lease sale in the three to 12 mile zone, while Alaska typically completes a similar rigorous evaluation and analysis in two to three years. The state also maintains a consistent and predictable leasing schedule, providing oil companies a better opportunity to plan and execute exploration budgets. In addition, the State's stipulations and mitigating measures for oil and gas exploration and development offer better environmental protection for marine life, the multi-million dollar fishing industry, and the subsistence lifestyle of many coastal residents. Again, we believe Alaska can more efficiently and competently manage this resource in the three to 12 mile zone than can the federal government.

In another initiative regarding ocean resources, the State of Alaska already is working with other Pacific states to assess the resource potential of the EEZ in the Northeast Pacific Ocean. This includes an effort to identify priorities for research and management, and to analyze capabilities for ocean governance.

In addition to granting coastal state jurisdiction based on our demonstrated competence in protecting and managing ocean resources off our coasts, we believe there is a sound policy basis for extending coastal state ownership over the expanded territorial sea. Congress concluded in 1953 that the states were the proper owners of the submerged lands within their boundaries and the waters for which they had jurisdiction. There are good reasons for this, and they are as valid as they were 35 years ago. First, the coastal states are most significantly impacted by activities in the territorial sea. Second, and most important, it makes good sense to unify jurisdiction and ownership in one sovereign so that the police power is exercised coherently, not at cross purposes.

In conclusion, we request that Congress resolve the many questions this Proclamation has raised: to reaffirm the policy made by this body in 1953, to extend the states' jurisdiction over the expanded territorial sea, and to grant them ownership of the lands beneath it. Thank you for your consideration. We look forward to working with this Committee to implement the Territorial Sea Proclamation.

NATIONAL OCEAN INDUSTRIES ASSOCIATION
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STATEMENT
ON BEHALF OF THE
NATIONAL OCEAN INDUSTRIES ASSOCIATION

BY
PAUL L. KELLY
VICE PRESIDENT
ROWAN COMPANIES, INC.
HOUSTON, TEXAS

BEFORE THE
HOUSE SUBCOMMITTEE ON OCEANOGRAPHY AND GREAT LAKES

RELATIVE TO THE
PRESIDENTIAL PROCLAMATION
EXTENDING THE TERRITORIAL SEA
OF THE
UNITED STATES

WASHINGTON, D.C.
MARCH 21, 1989

Chairman Hertel and members of the subcommittee, I am Paul Kelly, Vice President of Rowan Companies, Inc. Rowan owns a fleet of mobile offshore drilling rigs which operate under contract to various oil companies throughout the world. In addition, we operate land drilling rigs in Alaska and the lower 48 states as well as a fleet of helicopter and fixed wing aircraft that primarily service oil and gas operators.

Today, I am testifying on behalf of the National Ocean Industries Association which represents over 325 companies engaged in all aspects of domestic offshore oil and gas exploration and development. My statement is endorsed by the International Association of Drilling Contractors which represents the contract drilling industry and the American Petroleum Institute which represents oil and natural gas producers.

Mr. Chairman, we look forward to working with you and your subcommittee on issues of mutual interest as the 101st Congress progresses.

The Presidential Proclamation of December 27, 1988, extending the territorial sea from its traditional seaward boundary of 3 miles to its new boundary of 12 miles was prompted by national security concerns. This is clear from the language of the proclamation. It is equally clear that the scope of the proclamation is limited to international purposes, it is neither intended, nor in our view does it, alter existing Federal or State law nor does it affect the domestic rights or legal interests of the states or the federal government.

We believe the issuance of this proclamation in the interest of national security and in the context of international law does not and should not be justification for alterations in the federal-state relationship that exists in the area of coastal and ocean policy. These relationships are complex and diverse. They are embodied in numerous federal and state statutes and regulations and they touch on a vast array of public and private interests. The offshore oil and gas industry is only one of the many interests involved in the interplay of federal and state authority over coastal and ocean policy.

Our experience in dealing with this regime of shared authority demonstrates that it can, at times, be a source of tension. There have been disputes over the question of whether or not a coastal state may have exceeded or failed to fully carry out its obligations under prevailing law. Similarly, in some instances the federal government has been accused of overreaching in the exercise of its authority and of failing to recognize the proper role of the coastal states. These tensions are a natural outgrowth of a situation where two parties share authority and responsibility and where the goals and objectives of the parties are, at times, divergent.

A good example of federal-state tension as it relates to the offshore oil and gas industry can be found in the area of coastal zone management. The recent history of the offshore oil and gas industry as it relates to state exercise of authority under the Coastal Zone Management Act is dotted with cases in which proposed projects have become ensnarled in the shared authorities of federal and state governments. While such cases have been frustrating and costly to the companies directly involved and, from our point of view, have served to delay or deny the nation potentially valuable and vital sources of domestic energy, they have been the exception and not the rule when the whole picture is examined. While I cannot speak for other interests that have been involved in this federal-state partnership, I suspect their experience is not greatly different from ours. In short, the federal-state partnership may not be perfect and some domestic laws and regulations may be in need of adjustment, but extending regulatory jurisdiction of the coastal states beyond its current reach is not the answer.

If Congress seizes on the excuse of the territorial sea proclamation to make major revisions in the many laws and regulations that bear on the federal-state partnership, it would be making a serious mistake. To grant the states full regulatory authority over a large portion of the federal Outer Continental Shelf through amendments to the Clean Air Act, Clean Water Act and Coastal Zone Management Act, for example, would relegate the national interest in this area to a secondary position versus the interests of individual states. The Outer Continental Shelf contains vast and diverse resources that should be managed in a balanced fashion with federal, state, and local interests in mind. However, in those cases where conflict does arise, we submit that the national interest must prevail. To grant individual states regulatory primacy over this vast area of federal territory would be an abdication of the responsibility of the national government to manage this area and its resources for the benefit of the whole nation. The only way to assure that the national interest will prevail is to continue to vest final decision making authority in the federal government.

Would the extension of jurisdiction of existing domestic statutes over the extended territorial sea be the first step toward granting coastal states jurisdiction over the mineral resources located in submerged lands beneath these waters? Not only would such a grant place vast and valuable resources beyond the reach of the national interest, it would have very serious implications for the federal budget. Income derived from oil and gas lease bonuses, rents, and royalties from the federal OCS is a major source of federal revenue. Over the past 35 years, this program has generated more than $90 billion in federal receipts and is expected to contribute approximately $2.7 billion in 1989. Approximately, one-third of that income is attributable to activity in the area between three and twelve miles from shore. The nation can ill-afford to forego either the opportunity to produce the badly needed hydrocarbon resources of this area or the income they produce for the federal treasury. It is one thing to share milk with one's neighbors, but quite another to give away the cow.

Regarding mineral development on the Outer Continental Shelf, we are today faced with a situation in which coastal states with the intent to do so, have been able to block OCS lease sales and development either through use of the federal legislative process or through their authority under Section 307 (c)(3) of the Coastal Zone Management Act. We seem to have one OCS policy for the Gulf of Mexico and another for California even though the OCS Lands Act calls for an equitable sharing of the costs and benefits of OCS development among the various regions of our country. The annual struggle over OCS leasing moratoria legislation is getting old. Continuing such moratoria does not represent a solution to the problem, but merely a postponement of the solution. A number of our constituents believe that one of the solutions is to seek federal legislation to narrow the coastal states' consistency powers. We would anticipate that any serious movement to extend the jurisdiction of domestic law over the widened territorial sea might invite attempts to narrow the states' consistency powers under CZMA.

In conclusion, existing statutes and regulations governing the federal-state relationship in coastal and ocean management, whatever their shortcomings, should not be extended to the new boundaries of the territorial sea. We believe Congress should not use a step taken by the president for national security reasons in the arena of international law as an excuse to justify fundamental changes in these laws and regulations. Others will certainly urge Congress to take the very steps which we believe would impair the national interest in favor of the interests of some coastal states. We urge you in the strongest possible terms not to do so.

TESTIMONY OF EDWARD D. EVANS
BEFORE THE
SUBCOMMITTEE ON OCEANOGRAPHY
COMMITTEE ON MERCHANT MARINE AND FISHERIES

March 21, 1989

Thank you, Mr. Chairman and members of the subcommittee.

I am testifying today on behalf of the Alaska Factory Trawler Association, American High Seas Fisheries Association, the Fishing Vessel Owners Association, the Midwater Trawlers' Cooperative, the North Pacific Fishing Vessel Owners Association, Northwest Fisheries Association, and the Pacific Seafood Processors Association. These groups share a common concern about the impact of the extension of the territorial sea on domestic law for the management of fisheries in the present Exclusive Economic Zone and on the operation of fishing industry vessels in U.S. waters. For these reasons, the above referenced organizations want the present inner boundary of the Exclusive Economic Zone to remain unchanged.

The Presidential Proclamation of December 28, 1988 extending the U.S. territorial sea to 12 nautical miles from the baseline makes clear that no existing Federal or state law is affected by the proclamation. Others testifying here today are more qualified to speak to the need for Congress to act to implement the proclamation. However, in the event that implementing legislation is deemed necessary, we ask that federal fishery management authority and jurisdiction remain unchanged. Since the Magnuson Fishery Conservation and Management Act was enacted in 1976, U.S. fishermen have operated within a fisheries management structure that includes federal representatives and state officials from the region in the decision making process. Seven national standards guide the management of U.S. fisheries resources from 3 to 200 miles. Two of those standards provide that individual stocks of fish shall be managed as a unit throughout their range and that conservation and management measures shall not discriminate between residents of different states.

The Magnuson Act represents a series of compromises which attempted to balance the interests of fishermen of the nation, many of whom fish in waters that may be somewhat distant from their State. Nothing contained in the Presidential Proclamation changes the current balance. We urge that any further action taken to establish extended national boundaries for defense purposes be crafted so as to avoid intrusion on the jurisdictional regime set forth in the Magnuson Fishery Conservation and Management Act.

Clearly, Congress intended to establish a cooperative federal/state management authority. In the North Pacific, substantial capital investments have been predicated on this system. The U.S. fishing industry invested $1.0 billion in the 1980's constructing vessels which have displaced foreign fishing fleets from U.S. waters. While foreign processing of U.S. caught fish reached a peak of about 70 percent of the catch in 1987, U.S. shoreside and floating processors are now utilizing almost all of the groundfish resources of the Bering Sea and Gulf of Alaska. It is the investment stability caused by the assumption of management by the federal government over these resources which led to the creation of a $1.0 billion new industry in Alaska and Northwest states.

Fishermen and processors represented by these organizations were not reading between the lines or operating on implicit understandings when they made their investments. A 1978 amendment to the Magnuson Act stated that a principal goal of the U.S. fisheries policy is to encourage the development by the United States fishing industry of fisheries which are currently underutilized or not utilized by U.S. fishermen, including bottom fish off Alaska. These fisheries, now developed, are under the management of the regional fishery management councils established by the Magnuson Act.

North Pacific ground fish stocks are managed as a single stock unit within the U.S. zone and significant portions of those stocks are located between 3 miles and 12 miles off the coast. It would be extremely unwise to bifurcate management of these important stocks by making them transboundary stocks when in fact and under existing law, they are not. The resultant split between management authorities would be extremely inefficient and controversial. Management and enforcement would be more expensive, and dollars for these programs are hard enough to come by already.

Conservation and wise use of fishery resources depends on increased cooperation, both internationally and within the jurisdictional boundaries of the U.S. The existing management regimé created by the Magnuson Act is a reasonable approach, therefore, we argue for the status quo.

A bill introduced by Congressman Lowry in the 100th Congress, which addressed the extension of the territorial sea to 12 miles, also provided that no change in boundaries for domestic purposes would occur, and explicitly called for retention of the status quo for fisheries jurisdiction. The Lowry bill passed the House, but the Senate failed to act on its version of the bill before adjourning last Fall.

We supported the Lowry approach in testimony before this subcommittee in August, 1988 and we continue to hold that position.

Our interest is to preserve the integrity of the Magnuson Act, which has brought prosperity and stability to the North Pacific fisheries. This necessarily includes the maintenance of the inner boundary of the Exclusive Economic Zone at three miles from the baseline.

It is also imperative that any extension of the territorial sea not interfere with the operation of fishing and fishery support vessels in the Exclusive Economic Zone. Joint venture operations utilizing foreing processing vessels should, for example, continue to be allowed within the 3-200 mile zone as presently defined; foreign transport vessels should remain eligible to pick up cargo from U.S. vessels up to 3 miles offshore; and the Jones Act prohibitions against the use of foreign built and/or non-U.S. citizen owned U.S. flag vessels in the coastwise trade should not be extended beyond the current 3 mile limit.

Thank you for inviting the participation of the fishing industry at this hearing. I will be glad to answer any questions that you might have.

TESTIMONY OF WILLIAM N. MYHRE
BEFORE THE
SUBCOMMITTEE ON OCEANOGRAPHY
COMMITTEE ON MERCHANT MARINE AND FISHERIES
MARCH 21, 1989

Mr. Chairman and members of the Subcommittee, my name is Bill Myhre and I am a partner in the Washington, D.C., office of Preston, Thorgrimson, Ellis and Holman, a law firm based in the Pacific Northwest. Our firm represents a wide variety of maritime and fishing industry clients whose operations may be affected by the President's proclamation of December 28, 1988, to extend the territorial sea to twelve miles. I appreciate the opportunity to appear before the Subcommittee today as you examine the ramifications of the President's proclamation. I have prepared this testimony not on behalf of any particular client, but rather from my perspective as a legal practitioner who deals with a wide range of maritime, fisheries, shipping and related laws on a regular basis. My principal concern is with the potential confusion and unintended consequences which may result from this proclamation and the need for Congressional action to reduce that uncertainty.

Upon first reading, the Presidential proclamation extending the territorial sea seems clear enough on its face: the demarcation of our country's sovereign rights and jurisdiction which was once delineated by an imaginary line three miles from our shores has been now redrawn at twelve miles. The consequences of this action, however, are far from clear. Most troubling is the potential impact on a wide range of domestic laws, notwithstanding a one sentence proviso in the proclamation which seeks to limit its effect so as not to extend or otherwise alter "existing federal or state law or any jurisdiction, rights, legal interests, or obligations derived therefrom." But how can our nation's jurisdiction be extended without altering existing federal jurisdiction? Is this proviso simply a "quick fix" to avoid, or shift to the new administration, the painstaking and controversial task of trying to determine which of the myriad of potentially affected statutes should be amended in order to advance the professed goals of "national security and other significant interests"?

Assuming the President, acting alone, had the authority to extend the territorial sea, two principal questions emerge: (1) Did the President successfully extend the territorial sea for some purposes (i.e., national security), but not for others?[1] And (2) if not, what is the practical impact of an extension for all purposes on activities governed by various laws which rely on the boundaries of the territorial sea in determining their application?

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[1] If the President is in fact legally able to limit the reach of the proclamation in a manner consistent with the proviso, a critical subsidiary question remains: for what specific purposes was the territorial sea actually extended? The expressed "national security" goal offers some guidance, however the catch-all reference to "other significant interests" seems to leave the scope completely open to varying interpretations.

It is the second question that I address today. While I support my colleagues on this panel in the position that the President was able to limit his proclamation to national security and other significant interests, it is important to understand the consequences if that is not the case.[2] The practical result of an inadvertent extension of the territorial sea under all federal statutory schemes is likely to be large scale confusion with the potential for unintended results.

1. The Potential for Confusion if the Proclamation is Found to Affect Domestic Laws

The potential for confusion if the proclamation's limiting proviso is not upheld, and if Congress does not act, can be illustrated by simply looking at the number of statutes that could be affected. A straightforward computer search found the phrase "territorial sea" or "territorial waters" in a total of 151 separate sections of the United States Code and 218 individual sections of the Code of Federal Regulations. And that is just the tip of the iceberg: by including phrases that are generally interpreted to refer to the territorial sea boundary such as "high seas," "navigable waters," "domestic voyages," and

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[2] The Department of Justice was sufficiently unsure of the President's ability to extend the territorial sea for some purposes and not others that it recommended companion legislation substantially identical to H.R. 1405 under consideration by the Subcommittee today. See Office of Legal Counsel, Department of Justice, Memorandum to Abraham D. Sofaer, Legal Adviser, Department of State, Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea (October 4, 1988).

"waters under U.S. jurisdiction,"[3] the number of provisions jumps to more than 1,000; with a total of 392 statutes and some 614 sections of the Code of Federal Regulations potentially affected.

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[3] The definition of "navigable waters of the U.S.," "high seas," and "waters under U.S. jurisdiction" is not entirely clear or uniform throughout the U.S. Code and federal regulations. However, the wording of a number of statutes indicates that these terms are defined by territorial sea boundaries. See 42 U.S.C.A. § 9601(15) (West 1983) (CERCLA: "'navigable waters' or 'navigable waters of the United states' means the waters of the United States, including the territorial seas"); 18 U.S.C.A. § 1802(13) (West 1985) (MFCMA: high seas lie outside all nations' territorial waters, including the U.S. territorial sea). In addition, in United States v. Louisiana, the Supreme Court said that

> Under generally accepted principles of international law, the navigable sea [note that this is not referring to navigable waters of the U.S.] is divided into three zones, distinguished by the nature of the control which the contiguous nation can exercise over them. Nearest to the nation's shores are its inland, or internal waters. These are subject to the complete sovereignty of the nation, as much as if they were part of its land territory, and the costal [sic] nation has the privilege even to exclude foreign vessels altogether. Beyond the inland waters, and measured from their seaward edge, is a belt known as the marginal, or territorial sea. Within it the coastal nation may exercise extensive control but cannot deny the right of innocent passage to foreign nations. Outside the territorial sea are the high seas, which are international waters not subject to the dominion of any single nation.

United States v. Louisiana, 394 U.S. 11, 22 (1969).

See also Geneva Convention on the High Seas, Art. 1, as reenacted in the 1982 United Nations Convention on the Law of the Sea (U.N. Doc. A/CONF. 62/122).

Moreover, there are other applications of these terms that will not turn up in so mechanical a search. For example, coastwise trade has been interpreted by the Customs Service to include transportation of merchandise between points in the territorial sea -- although neither the term territorial sea nor any derivative appears in the statute or the implementing regulations. Thus, the potential number of statutes and regulations affected by the proclamation, if it is not or cannot be limited, is enormous.

A recent Supreme Court decisiion reiterates the canon that, unless contrary intent appears, all federal statutes are deemed to apply to the limit of U.S. territorial jurisdiction.[4] Under this canon, unless Congress acts to clarify the situation, it appears that even a wider range of activities within the newly created zone may be subject, at the very least, to legal uncertainty, and that unintended consequences are very likely to follow.

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[4] This canon of statutory construction was cited by the Supreme Court in a recent decision which held that the phrase "territory and waters, continental and insular, subject to the jurisdiction of the United States," as it appears in section 1603(c) of the Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1602 *et seq.*, limits the applicability of the Act to areas within the U.S. territorial sea. *Argentine Republic v. Amerada Hess Shipping Corp.*, ___ U.S. ___, 109 S.Ct. 683, 691, __ L.Ed. ___ (1989), (citing *Foley Brothers v. Filardo*, 336 U.S. 281, 285 69 S.Ct. 575, 577, 93 L.Ed. 680 (1949)). The *Amerada Hess* decision also notes in a footnote that "the President has announced that the United States would henceforth recognize a territorial sea of 12 nautical miles." *Id.* at 691 n. 8.

2. Selected Examples of Statutes Likely to be Affected

There is no simple way to determine which statutes and regulations would be affected by the extension of the territorial sea or which schemes should be re-examined as candidates for legislated changes. This can be determined only by a detailed case-by-case examination of all potentially affected statutes and regulations. What follows are some selected examples[5] where statutory schemes affecting vessel safety, seamen's rights and the operations of coastwise-qualified and fishing vessels could be significantly impacted if the territorial sea were extended to twelve miles for purposes of the particular statute at issue.[6]

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[5] While other witnesses are addressing environmental statutes today, it is important to note that certain other environmental measures of concern to maritime interests could be impacted if the twelve-mile extension applies to all federal laws.

One potential impact relates to ocean dumping. Federal law regulates, and at times prohibits, dumping, of any kind of matter, into the U.S. territorial sea or contiguous zone, and it regulates material taken from the U.S. and dumped into ocean waters in general. 33 U.S.C.A. § 1401 (West 1986). EPA can issue permits for dumping, either within or outside the U.S. territorial sea, after evaluating the need for the disposal and its probable impact. Id. § 1412. However, EPA is prohibited from issuing permits if the Secretary of Army determines that the dumping would adversely affect navigation in the territorial sea. Id. § 1416(c). See also 33 U.S.C.A. §§ 1501(a), (10), § 1518(a)(2), (b) (West 1986).

[6] These examples have been selected after an initial review of some of the numerous statutes thought to be affected. What follows is by no means a definitive analysis but rather an attempt to identify some of those instances where problems may arise.

a. Coastwise Laws

The coastwise laws of the United States generally limit the transportation of merchandise between any points in the United States to coastwise-qualified vessels meeting certain specified requirements.[7] The Customs Service has defined points in the United States broadly to include any point of water within the territorial sea.[8] Extension of the territorial sea with respect to the application of the coastwise laws could bring economic activities conducted between three and twelve miles within the scope of those laws, thus requiring the use of coastwise-qualified vessels. Offshore oil exploration and fishing activities come immediately to mind.

While presumably most offshore oil vessels are coastwise-qualified,[9] that is clearly not the case in the fishing industry.

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[7] With certain very limited exceptions, only vessels which have been built in the United States and are owned and documented by U.S. citizens and which have never been documented under foreign flag or rebuilt abroad are coastwise-qualified and eligible to engage in coastwise trade. 46 app. U.S.C.A. § 883 (West Supp. 1988).

[8] See Cust. Serv. Dec. 79-466 (June 7, 1979); see also Priv. Ltr. Rul. 105933 PH (March 3, 1983), Cust. Serv. Dec. 80-46 (July 20, 1979).

[9] Under the 1978 amendments to the Outer Continental Shelf Lands Act, 43 U.S.C.A. §§ 1311-1356, drilling platforms and other structures outside the territorial sea are treated "as if the outer Continental Shelf were an area of exclusive federal jurisdiction located within a state." 43 U.S.C.A. § 1333(a)(1) (West 1986). Therefore such structures are treated as coastwise points by the Customs Service, and must be serviced by coastwise eligible vessels. See, e.g., Customs Ruling 104880.

Until recently[10] fish processing and tender vessels could be constructed overseas and all fishing industry vessels, including harvesting vessels, could be rebuilt overseas without loss of fisheries privileges -- yet all of these vessels would be ineligible to operate in coastwise trade. Moreover, owners of fishing industry vessels need not meet the more stringent U.S.-citizen ownership standards required of coastwise-qualified vessels.[11] Hence, many owners of fishing industry vessels made investment decisions to forego coastwise privileges because their anticipated operations were beyond the territorial sea where coastwise privileges were not necessary.

For example, any non-coastwise qualified fish processing vessel is prohibited, within the three-mile territorial sea, from taking on board fish from a harvesting vessel, processing that catch, and landing it in a U.S. port. Assuming the proclamation does not affect coastwise laws, such activity would be permitted outside three miles. Presently, much of this fish processing activity necessarily takes place between three and twelve miles because, among other reasons, that is where certain targeted fish stocks are located. For the owners of these vessels, which in some cases represent investments in excess of $40 million per vessel, the consequences of prohibiting operations between three and twelve miles -- as extension of the territorial sea would dictate -- would be nothing short of disastrous.

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[10] The Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987, Pub. L. 100-239, prohibited fishing industry vessels from being rebuilt overseas and required fish processing and tender vessels to be built in the United States. 46 U.S.C.A. § 12108 (West 1988).

[11] 46 app. U.S.C.A. § 802(c) (West 1988).

b. Vessel Safety Laws

The potential for aberrant results can be illustrated with various vessel safety laws, where the extension of the territorial sea could conceivably result in lower safety standards under some statutory provisions, yet higher standards under others.

One example stems from varying definitions of the related term "navigable waters". It is alternatively defined in some cases to specify three geographic miles seaward from the baseline[12] and in others to reference the territorial sea.[13] Using the former definition, extension of the territorial sea would presumably have little effect; using the latter, it would make all the difference. Thus, depending on which definition is used, a jurisdictional void could be created. For example, Chapter 45 of Title 46 contains certain requirements for uninspected fish processing vessels. In an effort to reach all fish processing vessels within the defined class Congress made the chapter applicable to fish processing vessels:

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[12] 33 C.F.R. §§ 329.12(a), 328.4(a) (1987), cited favorably in Kaiser Aetna v. United States, 444 U.S. 164 (1979).

[13] See, e.g., Clean Water Act which defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C.A. § 1362(7) (West 1986).

> (1) on the navigable waters of the United States; or
>
> (2) owned in the United States and operating on the high seas.[14]

The term "high seas" is generally defined in terms of waters beyond the territorial seas[15] (i.e. outside of twelve miles, assuming the proclamation is applicable). However if the three-mile definition of navigable waters is used, then a nine mile jurisdictional void is created where fish processing vessels could operate without being either on the navigable waters or on the high seas. It is truly a case where "six of one and half dozen of another" are not equivalent measures. Other provisions governing the inspection and regulation cf vessels employ similar language.[16]

It is also possible that extension of the territorial sea will result in higher safety standards being imposed on foreign vessels operating between three and twelve miles from shore. If, for example, "navigable waters" are found to be coterminous with the territorial sea, then safety requirements imposed only on foreign vessels which are "on the navigable waters of the United States,"[17] would be triggered in the nine mile zone between three and twelve miles. Similar results may follow where the phrases "on waters subject to the jurisdiction of the United States,"[18] or "within the territorial waters of the United States"[19] appear in the statute. If these requirements were deemed to apply out to twelve miles, foreign vessels operating between three and twelve miles could be affected.[20]

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[14] 46 U.S.C.A. § 4501 (West 1988).

[15] See supra note 3.

[16] 46 U.S.C.A. §§ 4101, 4301 (West 1988). The definitional chapter of Title 46 does not define the term "navigable waters" thus leaving the choice of definitions unsettled. 46 U.S.C.A. § 2101 (West 1988).

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[17] See, e.g., 46 U.S.C.A. § 4101(1) (West 1988) (safety standards for uninspected vessels); 46 U.S.C.A. § 4501(1) (West 1988) (safety standards for uninspected fish processing vessels); 46 U.S.C.A. § 5102(2) (West 1988) (load line requirements); 46 U.S.C.A. § 6101(d) (West 1988) (reporting marine casualties).

[18] See, e.g., 46 U.S.C.A. § 2301 (West 1988) (safe operation of vessels generally); 46 U.S.C.A. § 4301(a) (West 1988) (safety standards for recreational vessels).

[19] See, e.g., 47 U.S.C.A. § 321(b) (West 1962) (requiring vessels to give priority to distress signals and communications).

[20] Other statutes pertaining to maritime safety may also be impacted by a generally applicable proclamation. For example, the Ports and Waterways Safety Program directs the Secretary of Transportation to designate necessary fairways and traffic separation schemes for vessels operating in the territorial sea of the United States, and in high seas approaches to and from ports and places subject to United States jurisdiction. 33 U.S.C.A. § 1223(c)(1), (d) (West 1986). Could the proclamation extend the Secretary's authority, and responsibility, another nine miles?

c. Damages Paid to Seamen, Longshoremen, and Harbor Workers

Several statutes, as well as general maritime law, govern certain tort actions involving both seamen and non-seamen where there is injury or death during maritime employment.[21] A number of these laws may be unaffected by a general extension of the territorial sea. However, this has been an area of law in turmoil, and at the very least, an extension may create confusion about the application of some of these statutes.

3. Selected Examples of Statutes Likely to be Unaffected

Not all statutory regimes would appear to be disrupted by a conclusion that the President had failed to limit the scope of the proclamation. Perhaps the most notable of these is the Magnuson Fishery Conservation and Management Act (MFCMA), which establishes U.S. sovereign rights over conservation and management of fish that are found in the 200-mile Exclusive Economic Zone (EEZ) and codifies U.S. authority to manage fishing for anadromous species or Continental Shelf resources beyond the EEZ.[22]

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[21] See, e.g., the Jones Act, 46 U.S.C.A. § 688(a) (West Supp. 1988); the Death on the High Seas Act, 46 U.S.C.A. § 761 (West 1975); and the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C.A.A. § 902 (West 1986).

[22] 16 U.S.C.A. §§ 1801-1882 (West 1985).

At the time the MFCMA was drafted it clearly stated that the fishery conservation zone (now the EEZ) would be "a zone contiguous to the territorial sea of the United States" that would start at "a line coterminous with the seaward boundary of each of the coastal states."[23] The 1976 conference report, as well as Senate debate on the bill, stipulated that each state's seaward boundary would be synonymous with seaward boundaries established in the Submerged Lands Act of 1953, which is no more than three nautical miles on the Atlantic and Pacific coasts and no more than three marine leagues into the Gulf of Mexico.[24]

In addition, the MFCMA was later amended to provide that a state's jurisdiction under the Act encompasses "any pocket of waters that is adjacent to the State and totally enclosed by lines delimiting the territorial sea of the United States pursuant to the Geneva Convention on the Territorial Sea and Contiguous Zone or any successor convention to which the United States is a party."[25] The Geneva Convention extends the U.S. territorial sea to three miles.

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[23] The Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, reprinted in Senate Comm. on Commerce, 94th Cong., 2d Sess., A Legislative History of the Fishery Conservation and Management Act of 1976, at 6-7 (1976).

[24] Id. at 78, 458-471; see 43 U.S.C.A. § 1301 (West Supp. 1988).

[25] 16 U.S.C.A. § 1856(a)(2)(A) (West 1985).

Similarly, the Atlantic Tunas Convention, through which the Secretary of Commerce limits tuna catches in the 200-mile EEZ in terms of species, fishing operations, and quantity, should not be impacted by the proclamation. Like the MFCMA, the Convention states that the EEZ begins at the "seaward boundary of each coastal state," which should not be changed by extension of the territorial sea.[26]

In addition, the Salmon and Steelhead Conservation Act, which authorizes a cooperative program to enhance and manage salmon and steelhead resources between the U.S., the states of Washington and Oregon, and fishing treaty Indian tribes, should not be impacted by the proclamation. The conservation areas governed by the Act include the "fishery conservation zone over which the Pacific Fishery Management Council has jurisdiction," which is the EEZ off the coasts of Washington and Oregon established by the MFCMA.[27]

Finally, questions have arisen concerning the potential impact of an extension of the territorial sea on existing prohibitions on gambling ships and the transportation of gambling devices.[28] Although not entirely free from doubt, it appears as though these statutes reach activities on the high seas as well as the territorial sea and that application of the proclamation to these laws would have little practical effect.[29]

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[26] See 16 U.S.C.A. § 971(4) (West 1985).

[27] See 16 U.S.C.A. § 3302(4), (17) (West 1985).

[28] 18 U.S.C.A. § 1082 (West 1969); 15 U.S.C.A. § 1175.

4. Conclusion

There are a great many laws potentially affected by the extension of the territorial sea to twelve miles. Our preliminary review indicates that while some are not affected, many are, and for many more the impact is simply unknown and impossible to predict. To wait for final judicial resolution of these questions only prolongs the uncertainty and the related costs to the private sector in attempting to comply with requirements which may or may not be applicable. Anything that Congress can do to eliminate, in a rational way, the uncertainty created by the proclamation will be a step in the right direction.

I recognize, too, that there is an even larger uncertainty which I have not addressed. This is the potential for this proclamation to be used as a basis for legislative initiatives to effect more fundamental and far-reaching changes in the relationship between the states and the federal government with respect to control and management of our ocean resources. These are complex issues affecting a wide variety of interests. Changes in this area should be based on the merits of the particular issue and should not be effected simply to bring an unrelated statutory scheme into compliance with a hurried effort by an outgoing administration to accomplish certain limited national security goals.

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[29] See definition of "special maritime and territorial jurisdiction of the United states" as defined in 18 U.S.C.A. § 7 (West 1969 & Supp. 1988).

Once again, I wish to thank you for this opportunity to share my views with the Subcommittee.

BRUCE HARLOW, REAR ADMIRAL, USN, (Ret.) OCEAN POLICY CONSULTANT

3422 N.W. LAKENESS RD, POULSBO, WASHINGTON 98370 March 15, 1989

STATEMENT BEFORE THE HOUSE SUBCOMMITTEE ON OCEANOGRAPHY AND GREAT LAKES

MARCH 21, 1989

I am Bruce Harlow, Rear Admiral, U.S. Navy, retired. I am presently serving as a consultant to the State of Hawaii on ocean policy matters. I am also serving as a consultant to the Pacific Basin Development Council (PBDC). Membership of PBDC includes the State of Hawaii, Commonwealth of the Northern Mariana Islands, the Territory of American Samoa and the Territory of Guam.

While on active duty I served as Department of Defense and Joint Chiefs of Staff representative for Ocean Policy Affairs and, during the latter stage of the negotiations, served as the Vice Chairman of the United States delegation to the Third United Nations Law of the Sea conference.

I appreciate the opportunity to discuss several legal and policy issues raised by the President's recent declaration of a 12-mile territorial sea for the United States and its territories and possessions.

Before answering the specific questions asked, it may be useful to examine briefly the legal attributes of the territorial sea under international law. In many maritime zones such as the Exclusive Economic Zone and the Continental Shelf regime, the United States possesses rights over resources but not sovereignty over the area itself. From a legal standpoint, the areas themselves retain their international or "extra-territorial" character.

On the other hand, when a nation properly extends its territorial sea, the area enclosed loses its international character. Thus, in effect, the President's 12-mile declaration (5928 of December 27, 1988) moved our nation's boundary 9 miles seaward. It should be noted this expanded area is not insignificant in size. I understand it encompasses approximately 180,000 square miles -- about the size of Texas.

I will now turn to the questions posed in your letter of March 14, 1989.

(1) WHAT EFFECT DOES THE PROCLAMATION HAVE ON EXISTING DOMESTIC LAW.

By its own terms, the Proclamation does not, in and of itself, extend or otherwise alter existing Federal or State law. The Proclamation, however, has dramatically altered the legal status of the area between 3 and 12 miles. Regardless of the Presidential disclaimer, in my opinion, the altered legal status does have a significant impact on domestic law.

Clearly, by virtue of the Presidential Proclamation, the United States has asserted complete sovereignty and jurisdiction over its expanded territorial sea and airspace, subject only to certain limited international rights of navigation. This assertion is entirely consistent with the 1982 Convention on the Law of the Sea and customary international law.

In my judgment, it is beyond reasonable argument to conclude that Congress has less power -- indeed, less responsibility -- to legislate in the 3 to 12 mile portion of the current territorial sea than it has in the historic 3-mile zone. Failure to extend Federal and state law to this area would create, in effect, a jurisdictional vacumn. Further, such an approach would be contrary to the longstanding position of the United States that nations should not claim maritime zones unless they are willing and able to administer such areas through appropriate legislation.

The key basis for determining the force and effect of existing Federal laws and regulations in the expanded territorial sea is Congressional intent. That is, did Congress intend a particular law to be applicable to a 3-mile zone regardless of the breadth of the territorial sea?

Aside from the revenue sharing issue, I believe research will disclose that Congressional intent, in many instances, was that Federal laws and regulations would be applicable to the territorial sea regardless of its breadth.

As a practical matter, laws that are intended to have general territorial application -- as opposed to extra-territorial application --should be generally viewed as having force and effect in the broadened territorial sea. In other words, as far as the application of U.S. law is concerned, activities undertaken within the 12 mile limit -- in light of the President's proclamation -- should now be viewed as having occurred "within the United States".

(2) WHAT SHOULD CONGRESS DO TO IMPLEMENT THE PROCLAMATION

At the present time it is unclear which domestic laws apply to the expanded territorial sea. It should be emphasized that foreign interests and activities such as maritime navigation and air travel are intertwined in this issue. To cite one example having international as well an domestic implications, certainly there is a compelling need to ensure all laws related to drug interdiction and control are fully operative in the expanded territorial sea. Therefore, from an international as well as domestic standpoint, there is an urgent need to clarify the extent United States law applies in the 12 mile territorial sea.

As a first step, therefore, Congress should implement the Proclamation by identifying current legislation deemed to be in force in the expanded territorial sea by virtue of preexisting Congressional intent.

Secondly, Congress should identify gaps in current legislation created or exacerbated by the broadened territorial sea, and enact new legislation as may be required.

Thirdly, Congress should re-examine the broader question of State versus Federal rights and responsibilities, not only in the expanded territorial sea, but also in the Exclusive Economic Zone established by Presidential proclamation in 1983.

Because there is a manifest need to proceed quickly it would seem appropriate to establish a special Congressional working group to focus on these issues. At the same time, I believe it is important that State governments and key private enterprise interests also participate in the development of a unified national policy for these critical ocean areas off our shores.

(3) WHAT ROLE, IF ANY, SHOULD THE STATES HAVE IN THE EXTENDED TERRITORIAL SEA (3 TO 12 MILES)

Setting aside the issue of revenue sharing for the moment, as a general principle, the state, commonwealth and territorial governments should have the same rights and responsibilities in the expanded territorial sea as they currently possess in the 3-mile territorial sea.

It makes little sense to establish a unique Federal enclave in the portion of the territorial sea from 3 to 12 miles. Indeed, in terms of a wide range of coastal zone management issues, there is longstanding evidence of Congressional intent to recognize local authority over a broadened territorial sea.

Certainly, the issue of revenue distribution is, to say the least, complex. I believe, however, the overall interests of our Nation would be best served if the states, commonwealths and territories were able to receive an equitable share of the revenue derived from exploitative activities in maritime areas off their shores. This would lay the foundation for a positive and mutually beneficial Federal/State partnership.

With regard to exploitative activities in the expanded territorial sea (3 to 12 miles), a Federal/State partnership should be based on the following principles:

Federal law should,

Establish an effective State partnership with Federal authorities in determining the manner in which coastal and adjacent ocean areas are used in order to meet public health and welfare responsibilities and avoid indiscriminate development.

Assure that States have the right to prevent the degradation of coastal air and water quality by maritime activities.

Establish an appropriate interface between the rational development of ocean resources within the territorial sea and the development of the adjacent Economic Zone.

Recognize the right of States to plan and manage land and water uses in its coastal zone (including 3 to 12 miles) in a manner consistent with its adopted coastal policies.

Assure States the right to share in the benefits derived from the development of adjacent ocean resources consistent with associated risks, including an equitable share of revenue.

Statement

by

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University of California
Santa Barbara, California
and
Consultant to the State of Hawaii

at the

Hearing on the Presidential Proclamation
Extending the United States territorial sea

of the

Subcommittee on Oceanography
Committee on Merchant Marine and Fisheries
U. S. House of Representatives

March 21, 1989
Washington, D.C.

In the United States in the 20th century, we do not govern territory by federal agencies (although we used to) and we do not govern territory by congressional committees, except in the special case of the District of Columbia.

The results of all previous extensions of U.S. territory have led to the creation of states (or, in some cases, self-governing territories) but in this case, apparently the Reagan Administration foresaw something different — new territory of the United States subject only to federal ownership and control.

However, as I mentioned above, the motivation of the Reagan Administration was clear. And certainly, if it were possible to have a broad territorial sea for international purposes and a narrower one for domestic purposes, that would be splendid — but obviously it isn't possible. Do we know of any other nation that has followed this route?

No, that idea is a non-starter as even the Justice Department memorandum on the subject subtly recognized when it attached a suggested piece of legislation that the Administration might wish to have Congress pass.

Without doubt, Congress could act by passing the Justice Department legislation and create such a curious kind of U.S. territorial sea — a territorial sea of 12 miles width, with one domestic legal regime in the first quarter of the zone and a totally different one in the remaining three-quarters. But would that be good policy? Would it promote rational conservation and use of the U.S. coastal zone? The coastal states have been charged by Congress to develop and implement coastal management programs for the first three miles of the territorial sea. Who would do such plans for the remaining nine miles of the territorial sea — federal agencies?

My point here is that Congress must act on the issues involving the domestic implications of the territorial sea extension. The President clearly has the power to extend the U.S. territorial sea but by its own terms, his proclamation did not (and could not) change the laws of the land. Changing the law requires the action of both the President and the Congress as was reaffirmed in the Chada decision striking down some forms of the legislative veto.

If Congress were not to act, then the geographic scope of the 70 or more existing federal laws that use the term "territorial sea" would either be extended or not depending on interpretations of the legislative history and, I suppose, common sense regarding the particular issues involved in each piece of legislation. To my knowledge, only one law has been carefully examined in this regard — the Coastal Zone Management Act of 1972 — with diametrically opposite results in the two analyses I know about. Confusion and uncertainty of this sort is not in the public interest. On this aspect of the problem, I see no substitute for a law-by-law analysis and subsequent congressional action.

Mr. Chairman, in the last year or so, I have been acting as an advisor to the State of Hawaii on ocean management matters. From the perspective of Hawaii, the "unadorned" extension of the territorial sea has now created a nine-mile belt of "stateless" U.S. territory around that state. Hawaii now finds itself surrounded by this new "animal" — sovereign territory of the U.S. operating without the benefit (or prospect of) local or state government.

Hawaii cares a great deal about its ocean resources and environment. It has an active CZM program and has been working hard (and successfully) with the Minerals Management Service of the Department of Interior to create a state-federal partnership to govern ocean mining in its 200-mile zone. The State finds the unilateral action by the federal government to create a radically different kind of territorial sea totally inconsistent with the spirit of cooperation and partnership that it was attempting to promote in ocean resources management.

Hawaii must look to the Congress, therefore, to handle the important *domestic ramifications* of the territorial sea extension which the Administration apparently chooses to ignore. Hawaii's legislature is currently considering a resolution requesting Congress to do just that.

Of course, Hawaii is not alone in its concern. Most of the West Coast states, (the states I'm most familar with), share these concerns. In fact, the two important regional organizations of states and territories — the Western Governors Association and the Pacific Basin Development Council —

have also become interested and involved in both the earlier EEZ issue and now the territorial sea question. As a result of this relatively broad interest, several of us have been assembling a list of questions and policy issues that are raised by the extension. For the information of the committee, I have appended a draft version of this list to this statement. After the list is further refined, and funding is received, a series of two-month "mini-studies" by academic specialists will be commissioned. The results of this effort are expected to be avaiable by July 1st and hopefully will of interest to your committee. Additional hearings by your committee at that time, Mr. Chairman, would therefore be valuable. Not only could you receive the results of these studies but the positions and suggestions of additional coastal states would likely be available at that time as well.

Among other issues, these studies will address questions such as the implications of having two different regimes side by side in the expanded U.S. territorial sea; the consequences of having an extensive zone of sovereign but stateless territory in the U.S.; the extent to which the civil and criminal law of the adjacent state is or is not carried into the 3 to 12 mile zone, the legal character of the 3 to 12 mile zone and Congress's duties and responsibilities in this area; and options for possible joint federal-state management and revenue sharing in the expanded territorial sea.

Mr. Chairman, as I said earlier, it is certainly within the prerogative of the Congress to, in effect, "ratify" the internationally oriented territorial sea concept of the Administration and let the domestic ramifications fall as they may. But this "quick fix" approach will have some significant costs.

—a new and unnecessary ocean zone will be added to an already complex jurisdictional situation;

—a new series of boundary problems will be created around the new 12 mile line boundary and all of the old problems will continue to exist around the old 3-mile line as well;

—instead of using this change as an opportunity for simplification, it will be an occasion for adding considerable complexity and uncertainty which will, no doubt, be fertile ground for litigation.

I am not suggesting that devising a new set of state-federal arrangements in the expanded territorial sea will be easy — it most certainly will not be — but I am urging that we use this occasion as an opportunity to begin to move in that direction.

As you know, our nation has had a 40-year history of strife in this area and the courts continue to hear such conflicts. But we have learned a great deal since the original state-federal split in jurisdiction was made in 1953. We know much more about ocean resources and their distribution and value. We know much more about the relationship between the development of ocean resources and the demands that offshore development places on coastal communities. And the coastal states have made substantial strides in planning and managing their coastal zones and they are developing the capacity to plan for and manage ocean resources as well. It is time to reformulate the division of responsibilities between the federal government and the coastal states and this is the opportune time to do it.

Mr. Chairman, several devices are available to use in undertaking the studies necessary to support such a reformulation. A national ocean policy commission could do the job as could a more circumscribed national territorial sea commission. As you know, both have been put forward in recent legislation. Also suggested has been the use of a "select committee" of the House of Representatives similar to the approach used to develop the OCS Lands Act Amendments of 1978. A federal agency task force could do part of the job but the coastal state, the ocean user and the public orientation would be missing.

Of these, perhaps a federal-state territorial sea commission would be the most appropriate. Given reasonably clear policy guidance in enabling legislation, and a relatively bounded charge, it could be asked to examine the issues and recommend appropriate legislation within a fixed length of time, say, one year. If it was felt that a more comprehensive study such as was outlined in the recent national ocean policy legislation is needed, the territorial sea commission could so recommend.

Mr. Chairman, it is good that your committee is examining this issue at this time. It is clear that the expansion of the territorial sea raises both national and domestic concerns. To enact legislation that simply blesses the status quo would be, in my judgement, a mistake. It would ignore the entire domestic side of the issue. Not only would the interests of the coastal states and territories be unrepresented but the expanded domestic roles of certain federal agencies could be unclear.

In the name of reducing uncertainty, such status quo legislation would add complexity. It would create a new and entirely unnecessary ocean zone for the United States and one devoid of any mechanism for its rational planning and management. It would, in the last analysis, represent an opportunity lost.

Please act but act with care.

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Attached: Draft list of issues/questions for analyses.

Issues/Questions for Analyses

1. Describe the implications of the fact that both the CZMA and the OCSLAA define the "coastal zone" as extending to the seaward limit of the territorial sea (and not 3 miles, per se), recognizing that the legislative history of CZMA gives some significant support to the notion that Congress intended the coastal zone to expand with the territorial sea (see above and, as well, the Justice Department opinion issued prior to the Proclamation).

2. What are the implications of the December 27 proclamation on the use of the federal consistency provisions of CZMA wth regard to (a) activities in the 3 to 12 mile zone that directly affect the state's (or territory's) coastal zone and (b) activities beyond 12 miles that affect the 3 to 12 mile zone?

3. In the past, the criminal and civil law of the adjacent state was extended to platforms and other "fixed" activities beyond the 3 mile territorial sea by means of language in the Outer Continental Lands Act. With the December 27 proclamation, the zone between 3 and 12 miles is no longer OCS but territorial sea. Has a legal void been created in the 3 to 12 mile zone? Is so, is this an important legal void or not? What are the implications if this void were to continue? What are the options for closing such a void?

4. Describe the extent to which different legal, jurisdictional, and tax regimes would exist in the two zones of the U.S. territorial sea (0 to 3 and 3 to 12) if the proclamation is allowed to stand as issued. What impact would the existence of these two different regimes have on the citizens of the adjacent state, on others wishing to use the territorial sea, and on coastal and ocean management in general? Describe the need for, and the most efficient way to prepare, a coastal management program for the 3 to 12 mile portion of the extended territorial sea.

5. What is the legal character of the 3 to 12 mile zone? Does it represent a new type of offshore zone for the U.S.? Is it unique internationally? Is it federal "public land"? Recognizing the role that Congress has played with respect to other acquisitions of public land, what duties and responsibilities does Congress have with respect to this new zone?

6. Within the time constraints given, analyze the pros and cons of various options for the management and control of the expanded territorial sea. Consider total federal control of 3 to 12; state control of 3 to 12; joint state-federal approaches, including a joint approach for the entire territorial sea (0 to 12); a 50/50 split (a 6 mile zone for each); and others that have been suggested. As time permits, issues of equity, political feasibility, management capability, technical merit, and administrative complexity should be considered. Questions involving both planning and management responsibility and revenues (for example, those received from offshore oil/gas operations) need to be addressed.

7. According to a recent analysis by David Slade of CSO, more than 70 existing federal statutes refer to the "territorial sea". Based on the subject matter at issue and common sense, in which of them (and on what basis) is it reasonable to conclude that Congress intended for the geographic scope of the law to change if and when the territorial sea

changed? Are these decisions likely to be easy or difficult? What kinds of tests ought to be involved?

8. To aid in considering possible jurisdictional changes and revenue sharing approaches, collect and display data on the value and volume of ocean resource and use related activities in the following zones of U.S. offshore waters: 0 to 3 miles; 3 to 12 miles; and 12 to 200 miles. Information on government revenues (by type of resource or use), earned in these three zones should also be collected.

9. Does the constraint that the proclamation attempts to place on changes in domestic law or state-federal jurisdiction have any effect on U.S. ocean interests from an international perspective? Do any similar situations exist in other countries (i.e., two different kinds of territorial sea co-existing side-by-side)? When the U.K. broadened its territorial sea in 1987, were there any domestic implications?

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March 21, 1989

Statement of John G. Catena

On Behalf of

The Oceanic Society
Environmental Policy Institute
Friends of the Earth

Before the
Subcommittee on Oceanography and Great Lakes
of the
House Committee on Merchant Marine and Fisheries

Concerning
United States Territorial Sea Extension

Mr. Chairman and members of the Subcommittee, I am John G. Catena, Science/Policy Analyst for the Oceanic Society. I appreciate the opportunity to share our views on the newly established 12-Mile Territorial Sea and H.R. 1405, the Territorial Sea Extension Act of 1989. The Society is a 40,000 member non-profit environmental organization devoted to the protection, conservation and wise use of ocean and coastal resources. In all of our activities we are dedicated to protecting the oceans for the people and wildlife that depend upon them for life, livelihood and enjoyment. Recently, the Oceanic Society joined forces with Environmental Policy Institute and Friends of the Earth to form a new citizens advocacy organization for protection of the planet. The Oceanic Society will continue its work and mission as an operating arm of this new entity.

The extension of the U.S. territorial sea from three miles to twelve miles raises complex questions which, in our view, must be addressed through Congressional action. In this regard, we appreciate your efforts, Mr. Chairman, to take this necessary first step in examining this complex issue.

The oceans, though vast and covering over 70 percent of the earth, are a vulnerable and complex environment. Numerous unique and important species live in or depend upon the oceans. Too often, however, our ocean and coastal resources are mismanaged due to narrow, short range special interests, with inadequate scientific understanding of the consequences. We have seriously damaged some of our coastal waters, where marine life is more plentiful. Much less is known about long-term threats to the deeper oceans, but there are strong signs of damage there, too.

In 1985, the Environmental Protection Agency initiated its "Near Coastal Waters (NCW) Strategic Planning Initiative," a multi-year effort to maintain and enhance near coastal water environmental quality. As the first stage of the NCW initiative, EPA's

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Office of Marine and Estuarine Protection released a "Strategic Options Paper" in August, 1986.[1] The findings of that paper substantiate the urgent situation we are facing. Quoting from the paper's introduction (footnotes omitted):[2]

> Degradation of the near coastal water environment has become a critical national problem. The ecological, economic, recreational and aesthetic integrity of near coastal waters systems in the United States is threatened daily by the cumulative impacts of a multitude of activities within the coastal drainage basins, in the near coastal waters, and on the ocean. Portions of near coastal water and shore habitats in every geographic region of the country and in every coastal state have been found to be degraded to a moderate or severe degree.
>
> Continuing increases in year-round and seasonal coastal populations are adding pressures to near coastal water ecosystems already stressed by multiple uses and demands. As near coastal water environments become degraded, less of the resources are available for use by more people. There are adverse impacts to fisheries, outdoor recreation, and human health, as well as secondary impacts on tourism and property values.

Given this serious and growing problem, policies affecting the future of the ocean and its resources must be developed with environmental consequences as a primary consideration. They must be set with appropriate respect for the linkages in the ecosystem. An ecological ethic is essential in order to ensure the protection, conservation and wise use of our vital marine resources.

I. The 12-Mile Territorial Sea and its Effect on Domestic Law and Policy

The territorial sea is a belt of coastal waters adjacent to the land territory and beyond the internal waters over which the nation exercises sovereignty and jurisdiction, subject to innocent passage of vessels. This sovereignty applies to the airspace above as well as the seabed and subsoil. On December 27, 1988, President Reagan extended, by proclamation, the U.S. territorial sea from three to twelve miles.[3]

It is clear that the driving force behind the extension of the territorial sea was to enhance national security. While we acknowledge this need, the extended territorial sea at the same time raises complex questions for domestic law and policy. In addition to the enhancement of national security, as reflected in the 1982 Law of the Sea Convention, a nation has the right to regulate within its territorial sea:

- the safety of navigation and the regulation of maritime traffic;

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[1] Office of Marine and Estuarine Protection, U.S. Environmental Protection Agency, "Near Coastal Waters Strategic Options Paper," August 12, 1986.

[2] Id. at I-1.

[3] U.S. President, Proclamation, "Territorial Sea of the United States of America," 54 Federal Register, No. 5, January 9, 1989, 777.

- the protection of navigational aids and facilities and other facilities or installations;
- the protection of cables and pipelines;
- the conservation of living resources of the sea;
- the prevention of infringement of fisheries laws and regulations;
- the preservation of the environment and the prevention, reduction and control of pollution thereof;
- marine scientific research and hydrographic surveys; and
- the prevention of infringement of customs, fiscal, immigration or sanitary laws and regulations of the U.S.

Numerous federal laws and policies are potentially affected by the extension of the territorial sea, despite the proclamation's disclaimer that,

> [n]othing in this Proclamation: (a) extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom...

In fact, there already are instances where federal agencies have extended their authority out to the 12-mile territorial sea. For example, the Department of State has cabled each of the U.S. embassies requesting them to clarify to host governments that the U.S. will now control access to conduct marine scientific research by foreign scientists within the 12-mile U.S. territorial sea as a result of the proclamation. While this is clearly within the right of the U.S., it makes it unclear as to exactly what the above disclaimer applies to.

A few selected examples of other pertinent laws and policies will help highlight the ambiguities in Congressional intent in the use of the term "territorial sea." The most glaring of these is the Coastal Zone Management Act of 1972. The provision at issue in this statute is the definition of the term "coastal zone."

Under the CZMA, states may establish management programs within the coastal zone subject to approval by the Secretary of Commerce. The Act defines the "coastal zone" as:

> the coastal waters...and the adjacent shorelands,... strongly influenced by each other and in proximity to the shorelines of the several coastal states, and includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches. The zone extends, in Great Lakes waters, to the international boundary between the United States and Canada and, in other areas, seaward to the outer limit of the United States territorial sea (emphasis added).

The CZMA does not further define the term "territorial sea" nor does it indicate what effect an expanded territorial sea would have on the scope of the law. Legislative history, however, would indicate that Congress did contemplate such an expansion. In explaining the definition of the "coastal zone," the legislative history states that:[4]

> [a]s to the outer and inner limits of the zone, it extends outward,...in...areas bordering the oceans, seas, gulfs, and sounds, to the outer limit of the territorial sea which, under the present posture of international law, means 3 miles from the baseline from which the territorial sea of the United States is measured. Should the United States, by future action, ... extend the territorial sea further than the present limits, the coastal zone would likewise be expanded...

In an October 1988 assessment of the legal implications associated with issuance of the proclamation, the Department of Justice concluded that the "better view is that the expansion of the territorial sea will not extend the coverage of the [CZMA]...." However, the department does recognize the fact that the "effect of the proclamation on the CZMA is not entirely free from doubt."[5]

Another federal law which may be affected is the Magnuson Fisheries Conservation and Management Act (MFCMA). The territorial sea proclamation appears to have created a "twilight zone" with respect to the jurisdiction of the MFCMA -- where neither the states nor the federal government can claim management authority over the area between a state's seaward boundary and the outer limit of the 12-mile territorial sea. The MFCMA establishes a federal fishery management regime applicable to the exclusive economic zone. Section 3 of the MFCMA as amended (16 U.S.C. section 1802) defines the exclusive economic zone as:

> the zone established by Proclamation Numbered 5030, dated March 10, 1983. For purposes of applying this Act, the inner boundary of that zone is a line coterminous with the seaward boundary of each of the coastal States.

That legislative language, alone, would indicate that the expanded territorial sea would not affect the application of the law. However, in Proclamation Number 5030, the exclusive economic zone is defined as a zone contiguous to the territorial sea. If the status quo is maintained, the seaward boundary of the coastal states is three miles (or 9 miles in the cases of Texas and the west coast of Florida), yet the EEZ begins at the seaward limit of the territorial sea (or 12 miles offshore). The question thus arises, where does the territorial sea end and the exclusive economic zone begin, or are they overlapping? Additionally, Section 306(a) of the MFCMA states that:

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[4] U.S. House of Representatives, Coastal Zone Management, H.R. Rept. 92-1049 to accompany H.R. 14146, 94th Cong. 2d sess., 1972.

[5] U.S. Department of Justice, Office of Legal Counsel, Memorandum for Abraham D. Sofaer, Legal Adviser, Department of State, Re: Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea. October 4, 1988. The Justice Department cites other sections of legislative history to come to the above conclusion. It is our view, however, that Congressional intent either (1) called for an expansion of the coastal zone upon an extension of the territorial sea, or (2) is at best questionable.

> the jurisdiction and authority of a State shall extend (1) to any pocket of waters that is adjacent to the State and totally enclosed by lines delimiting the territorial sea of the United States pursuant to the Geneva Convention on the Territorial Sea and Contiguous Zone or any successor convention to which the United States is party... (emphasis added).

This section would indicate that a state's fishery management authority would extend throughout the 12-mile territorial sea. These apparently conflicting provisions should be amended to clarify their meaning.

A final example of the proclamation's effect on domestic law is with respect to the regulation of maritime traffic in the territorial sea. Under international law, most recently reflected in the 1982 Law of the Sea Convention, nations may exercise their right to regulate maritime traffic within the territorial sea. Thus it would appear that the Coast Guard's authority under the Ports and Waterways Safety Act (PWSA) (33 U.S.C. 1221 et. seq.) would be extended throughout the 12-mile territorial sea.

The PWSA gives the Secretary of Transportation, acting through the U.S. Coast Guard, the authority "to establish, operate, and maintain vessel traffic services, consisting of measures for controlling or supervising vessel traffic or for protecting navigation and the marine environment" in the navigable waters of the United States (which includes the territorial sea). However, taking the disclaimer in the proclamation at face value it would appear that the Coast Guard's authority to regulate such traffic would not be extended to the 12-mile limit. From an environmental perspective, this would not be a wise decision. In our opinion, it is in the best interest of the marine environment to extend the Coast Guard's regulatory authority over vessel traffic throughout the 12-mile territorial sea.

II. Congressional Action Needed

From the brief analysis above, it is clear that Congress must enact legislation clarifying the intent of the territorial sea proclamation. We, however, do not believe that H.R. 1405, the Territorial Sea Extension Act of 1989, represents the best course of action. This bill simply reaffirms the proclamation and makes no effort to clarify the numerous different uses of the term "territorial sea." In addition, it is our opinion that the proclamation, coupled with H.R. 1405, are only added examples of a piecemeal approach to U.S. ocean policy. As the territorial sea proclamation clearly exemplifies, ocean policy issues cannot be decided in a vacuum.

This issue represents one more reason for a comprehensive review of U.S. ocean policy. In this regard, we appreciate Representative Schneider's and other members of this committee's call for such a policy in H.Con Res. 69. In addition to the complexities arising from the extension of the territorial sea, in our view there are several other compelling reasons why the time is ripe for a review of U.S. ocean policy. These include:

- the establishment of the Exclusive Economic Zone;

- the growing importance of international considerations for the ocean and its resources (especially given the increased international support for the Law of the Sea Convention);

- the existing confusion and inconsistencies of present laws and regulations, including the coastal state's "consistency" authority under the CZMA;
- the expanding role of coastal states in managing their coastal resources and the need for better federal/state coordination;
- the lack of long-range planning; and
- the lack of any body similar to the former National Advisory Committee on Oceans and Atmosphere (NACOA) to continuously address ocean policy issues.

A continuance of this fragmented management style could lead to adverse environmental and economic effects on coastal communities, ineffective and contradictory domestic policies, as well as diminished U.S. leadership in ocean policy on the international level. Such a review could be conducted by a "national oceans policy commission" as proposed in previous legislation or some other similar body. Additionally, a reconstituted NACOA could be reestablished to carry forward and monitor the implementation of the commission's recommendations over the long-term.

A more modest approach would be for Congress to mandate a comprehensive study of the effect of the territorial sea extension on domestic law and policy. The Department of Justice opinion was too narrow in scope in that the only statute it considered was the CZMA. Clearly, numerous other laws are affected by the proclamation and deserve a more thorough examination.

Several mechanisms are available or could be created, to carry out a territorial sea study. These include, a distinguished panel of ocean policy practitioners, the Congressional Office of Technology Assessment, or an existing or new federal interagency group (including public advisory committee input). Whatever the mechanism, it needs to be constituted in a way that ensures balance among all the interests, including those of the environmental community. As a complement or precursor to such a study, Congress should hold further hearings which look at the discrete issues. To accomplish this, an ad hoc select committee on the territorial sea, similar to the former Ad Hoc Select Committee on the OCS, could be established to cut across committee jurisdictions.

Regardless of whether or not Congress did or did not define the term "territorial sea" in each and every statute, now that a new definition of the term exists (i.e. that it extends 12 miles from the baseline) federal laws should be amended to incorporate that definition or use another term to maintain the three mile limit for state waters where that is preferable. The point being, that the term "territorial sea" should have a consistent definition throughout the U.S. code.

* * *

Given the importance of the decision to extend the U.S. territorial sea and its potentially far reaching effects on domestic law and policy, Congress must act to clarify the meaning of the term "territorial sea." This should be preceded, however, by a thorough study of the effects of the extended territorial sea on U.S. law and policy -- either separately or as a component of a larger comprehensive review of U.S. ocean policy.

TESTIMONY OF BRIAN J. HOYLE
DIRECTOR
OFFICE OF OCEAN LAW AND POLICY
BUREAU OF OCEANS AND INTERNATIONAL SCIENTIFIC
AND ENVIRONMENTAL AFFAIRS
UNITED STATES DEPARTMENT OF STATE
BEFORE THE SUBCOMMITTEE ON OCEANOGRAPHY AND GREAT LAKES
MARCH 21, 1989

Thank you for this opportunity to address the Subcommittee today on the extension of the territorial sea of the United States of America. On December 27, 1988, President Reagan proclaimed an extension of the United States territorial sea from three to twelve miles. This action followed a recommendation of the Senior Interagency Group for Oceans Policy and Law of the Sea that the extension would enhance the national security interests of the United States. I respectfully request, Mr. Chairman, that a copy of the Presidential Proclamation be included in the official record of these hearings.

During the 100th Congress, last year, this Subcommittee concurred in the desirability of extending the territorial sea. The House of Representatives passed legislation to achieve this. Time ran out before the Senate could act.

From the Administration of President Washington until December 27th of last year, the United States claimed only a three nautical mile territorial sea. National security and the practice of the great majority of nations made it desirable to change this policy. The extended territorial sea applies to waters adjacent to the coast of the United States, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, and other overseas territories and possessions of the United States.

The Proclamation affects the breadth of the territorial sea only for international purposes. It does not affect the existing balance between the states and the federal government *inter alia* over development and conservation of living and non-living resources.

There is a strong desire in the Administration to maintain the *status quo* on the state/federal issues that could be raised in the nine mile area between the three nautical mile limit and the extended twelve nautical mile limit unless the Administration and the Congress decide to change by legislation this territorial application. To avoid prejudicing this state/federal question, the Proclamation clarifies that state and federal agencies' authorities under present statutes remain unaltered.

The Proclamation does not increase or diminish any rights or interests of any state of the United States under existing statutes that apply to the territorial sea. Nothing in the Proclamation extends the geographic application of any such statute beyond three nautical miles from the baselines from which the territorial sea of the United States is measured.

The President's action is fully consistent with international law as reflected in the 1982 United Nations Convention on the Law of the Sea. Under international law, the United States is entitled to exercise sovereignty over a territorial sea of not more than 12 nautical miles. Although the United States decided not to sign that Convention because of major problems in its deep seabed mining regime, the Convention's provisions with respect to traditional uses of the oceans such as navigation and coastal jurisdiction fairly balance the interests of all nations and reflect customary international law.

The Proclamation makes it clear that the United States will continue to fulfill its obligation to accord other nations the rights of innocent passage and of transit passage through straits to which they are entitled under international law as reflected in the applicable provisions of the 1982 Convention. By carefully observing and articulating these rights and obligations, the United States can guide the conduct of other countries in implementation of the territorial sea rights and duties to foster consistency with international law.

In issuing this Proclamation, the President acted within his constitutional authority and responsibility to conduct the foreign affairs and ensure the national security of the United States. Foreign countries are no longer able to station intelligence gathering vessels in the 3 to 12 nautical mile band of water. Within 24 hours of issuance of the Proclamation, a Soviet AGI was requested to depart and immediately complied.

The extension brings the United States into conformity with prevailing international practice. The United States brings to 107 the number of nations that claim territorial seas of twelve nautical miles. These include most of our Allies, the Communist bloc and most developing countries. Only eleven countries continue to claim only three nautical miles. Following the Proclamation, the State Department notified every government and the United Nations of the Presidential Proclamation and received objections from none.

At present, we are continuing to examine the possibility of extending the contiguous zone of the United States to twenty-four nautical miles. Action to extend the contiguous zone was not taken so that the Departments of State and Justice could further study the obligations of the United States under the 1958 Convention on the Territorial Sea and Contiguous Zone in the light of customary international law and state practice.

Thank you, Mr. Chairman and Members of the Subcommittee. We look forward to working with you in the coming months.

U.S. Department
of Transportation
United States
Coast Guard

Commandant
United States Coast Guard

Washington, D.C. 20593-0001
Staff Symbol:
Phone:

STATEMENT OF

REAR ADMIRAL JOSEPH EDWARD VORBACH

CHIEF COUNSEL, UNITED STATES COAST GUARD

BEFORE THE

U.S. HOUSE OF REPRESENTATIVES

HOUSE COMMITTEE ON MERCHANT MARINE AND FISHERIES

SUBCOMMITTEE ON OCEANOGRAPHY AND GREAT LAKES

21 MARCH 1989

Rear Admiral Joseph Edward Vorbach
Chief Counsel
United States Coast Guard

Rear Admiral Joseph Edward Vorbach became Chief Counsel of the United States Coast Guard, headquartered in Washington, D.C., in June 1986. RADM Vorbach's previous assignment was Commandant of Cadets at the Coast Guard Academy in New London, Conn., from 1983.

He served as Chief, International Affairs Staff for the Coast Guard at Headquarters from 1981 to 1983. Prior Washington, D.C., tours included Special Assistant for Law of the Sea for the Deputy Secretary of the Department of Transportation and Special Assistant for Law of the Sea to the Chief Counsel of the Coast Guard from 1977 to 1980. RADM Vorbach also served in the Office of the Chief Counsel as Assistant Chief, Legislation and Regulations Branch from 1968 to 1969.

RADM Vorbach was assistant professor of law at the Coast Guard Academy from 1969 to 1973. He served as the Legal Officer in the Eleventh Coast Guard District, Long Beach, Calif., from 1973 to 1977 and Chief, Law Enforcement Section, Fifth Coast Guard District Office, Portsmouth, Va. from 1962 to 1964.

His sea tours included service onboard the cutter *ABSECON*, homeported at Norfolk, Va., and on the icebreaker *WESTWIND* out of New York. He was the Commanding Officer of the 95-foot patrol boat *CAPE FAIRWEATHER*, stationed in New London, Conn., and commanded Loran Station Eniwetok in the Marshall Islands, South Pacific.

He received a Bachelor of Science degree from the Coast Guard Academy in 1959 and a Juris Doctor degree with honors from George Washington University, Washington, D.C., in 1968. He is a 1981 graduate of the National War College.

RADM Vorbach is a member of the Bar of the District of Columbia, and the states of New York and Virginia. He is also admitted to practice before the U.S. Court of Military Appeals and is a member of the Federal Bar Association. He has been a member of numerous United States delegations and an alternate representative of the United States to the third United Nations Conference on the Law of the Sea and to the Council of the International Maritime Organization. He has lectured and written articles and papers on the law of the sea and military justice.

RADM Vorbach's military awards include three Meritorious Service Medals, the Coast Guard Commendation Medal, the National Defense Service Medal and the Arctic Service Ribbon.

He is married to the former Alice Patricia Gordon of Jamaica, N.Y. They have four children: Frances Ann, Joseph Edward III, Emily Marie and Justin James.

STATEMENT OF REAR ADMIRAL JOSEPH EDWARD VORBACH
CHIEF COUNSEL, UNITED STATES COAST GUARD
BEFORE THE U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON MERCHANT MARINE AND FISHERIES,
SUBCOMMITTEE ON OCEANOGRAPHY AND GREAT LAKES
21 MARCH 1989

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE, I APPRECIATE THE OPPORTUNITY TO SUBMIT THIS STATEMENT CONCERNING THE EFFECT ON THE COAST GUARD OF THE EXTENSION OF THE TERRITORIAL SEA BY PRESIDENTIAL PROCLAMATION.

LAST YEAR I TESTIFIED BEFORE THIS SUBCOMMITTEE CONCERNING H.R. 5069, A BILL TO EXTEND THE TERRITORIAL SEA AND CONTIGUOUS ZONE OF THE UNITED STATES. AT THAT TIME I TESTIFIED THAT THE COAST GUARD SUPPORTED EXTENSION OF THE TERRITORIAL SEA. SUBSEQUENTLY, PRESIDENT REAGAN'S PROCLAMATION OF DECEMBER 27, 1988 EXTENDED THE TERRITORIAL SEA OF THE UNITED STATES FROM 3 TO 12 NAUTICAL MILES. THE UNITED STATES HAS NOW ESTABLISHED A TERRITORIAL SEA TO THE MAXIMUM LIMITS PERMITTED UNDER CUSTOMARY INTERNATIONAL LAW AS REFLECTED IN THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA.

THE PROCLAMATION WAS INTENDED TO EXTEND THE TERRITORIAL SEA ONLY FOR INTERNATIONAL PURPOSES. THE PROCLAMATION DID NOT ALTER EXISTING STATE OR FEDERAL LAW. THUS, THE PROCLAMATION WAS NOT MEANT TO CHANGE THE 3 NAUTICAL MILE LINE, PREVIOUSLY IDENTIFIED

AS THE TERRITORIAL SEA, FOR THE PURPOSES OF DOMESTIC LAW. ACCORDINGLY, NOTHING IN THE PROCLAMATION EXTENDED THE GEOGRAPHIC APPLICATION OF ANY SUCH STATUTES BEYOND 3 NAUTICAL MILES FROM THE BASELINES FROM WHICH THE TERRITORIAL SEA OF THE UNITED STATES IS MEASURED.

THE COAST GUARD IS INVOLVED WITH, AND RESPONSIBLE FOR, A MYRIAD OF OCEAN-RELATED ACTIVITIES WHICH TAKE PLACE IN THE TERRITORIAL SEA. TITLE 14, UNITED STATES CODE, ASSIGNS TO THE COAST GUARD PRIMARY DUTIES ADMINISTERING LAWS AND PROMULGATING AND ENFORCING REGULATIONS IN THE MARITIME ARENA FOR, AMONG OTHERS, MATTERS INVOLVING MARITIME SAFETY AND NAVIGATION, SMUGGLING, AND THE PROTECTION OF THE MARINE ENVIRONMENT.

NUMEROUS JURISDICTIONAL TERMS USED IN DOMESTIC LAW HAVE TRADITIONALLY BEEN APPLIED OUT TO THE LIMIT OF THE TERRITORIAL SEA OF THE UNITED STATES. SINCE MANY OF THESE TERMS ARE NOT SPECIFICALLY DEFINED BY STATUTE, AGENCIES HAVE INTERPRETED THESE TERMS BY REGULATION. SOME OF THE TERMS USED IN STATUTES INCLUDE: "NAVIGABLE WATERS," "TERRITORIAL WATERS," "WATERS SUBJECT TO THE JURISDICTION OF THE UNITED STATES," AND "WATERS OVER WHICH THE UNITED STATES HAS JURISDICTION." THE COAST GUARD HAS GENERALLY DEFINED THE OUTER LIMITS OF THE AREA DESCRIBED BY THESE TERMS AT PART 2 OF TITLE 33 OF THE CODE OF FEDERAL REGULATIONS, TO BE THE SAME AS THE OUTER LIMIT OF THE "TERRITORIAL SEA," HISTORICALLY 3 NAUTICAL MILES FROM THE BASELINES FROM WHICH THE BREADTH OF THE TERRITORIAL SEA IS

MEASURED. IN VIEW OF THE PROCLAMATION'S STATEMENT THAT EXISTING FEDERAL OR STATE LAW WAS NOT EXTENDED OR ALTERED, THE COAST GUARD'S STATUTORY AUTHORITIES HAVE NOT BEEN CHANGED BY THE PROCLAMATION. ACCORDINGLY, THE DEFINITIONS AND APPLICATION OF JURISDICTIONAL TERMS RELIED ON BY THE COAST GUARD TO CARRY OUT ITS MISSIONS, WHICH HAVE TRADITIONALLY BEEN APPLIED TO THE PREVIOUS TERRITORIAL SEA LIMIT OF 3 NAUTICAL MILES, HAVE NOT CHANGED. TO FULLY ENFORCE THESE STATUTES BETWEEN 3 AND 12 NAUTICAL MILES, CONGRESSIONAL ACTION IS NECESSARY TO EXTEND SUCH FEDERAL LAWS BEYOND 3 NAUTICAL MILES.

IT MAY BE IN THE INTEREST OF THE COAST GUARD THAT CERTAIN LAWS BE AMENDED TO CONFORM DOMESTIC LAW TO THE PROCLAMATION. SUCH LEGISLATION COULD HAVE SUBSTANTIAL AND SIGNIFICANT IMPACT ON THE OPERATIONS, REGULATORY AUTHORITY, AND RESOURCES OF THE COAST GUARD DEPENDING ON THE SPECIFIC APPLICATION OF THE LEGISLATION ON EACH OF THE LAWS WHICH THE COAST GUARD ENFORCES. THE COAST GUARD IS IN THE PROCESS OF ANALYZING APPLICABLE LAWS TO DETERMINE WHETHER THE GEOGRAPHIC APPLICATION OF SOME LAWS SHOULD BE EXTENDED AND WHETHER ADDITIONAL RESOURCES, BOTH IN PERSONNEL AND HARDWARE, WOULD BE REQUIRED TO IMPLEMENT AN EXTENSION OF AUTHORITY IN A GIVEN AREA.

TWO EXAMPLES OF POSSIBLE CHANGES ARE: IF OUR WATERWAYS SAFETY REGULATORY AUTHORITY AND OUR REGULATORY AUTHORITY TO DEFINE AND ESTABLISH ANCHORAGE GROUNDS WERE EXTENDED, WE WOULD GENERALLY BE ABLE TO REQUIRE VESSELS TO USE A

TRAFFIC SEPARATION SCHEME, ANCHOR, OR OPERATE IN A SPECIFIC MANNER OUT TO 12 NAUTICAL MILES FROM THE COAST, WHERE WE ARE PRESENTLY LIMITED TO 3 NAUTICAL MILES. IN THE AREA OF OUR SHIPPING LAWS, PENALTIES FOR OPERATING A FOREIGN VESSEL IN A NEGLIGENT MANNER WOULD BE APPLICABLE OUT TO 12 NAUTICAL MILES IF CERTAIN PROVISIONS WERE AMENDED TO CONFORM WITH THE PROCLAMATION.

ONE AREA NEEDING AN AMENDMENT TO CLARIFY THE COAST GUARD'S AUTHORITY IS THE PROTECTION OF UNITED STATES PORTS FROM THREATS TO THE SECURITY OF THE UNITED STATES PURSUANT TO 50 U.S.C. 191. THE PROCLAMATION HAS PROVIDED ENHANCED AUTHORITY FOR UNITED STATES FORCES TO TAKE THE "NECESSARY STEPS" TO RESTRICT FOREIGN SURVEILLANCE AND OTHER ACTIVITIES WHICH ARE PREJUDICIAL TO THE SECURITY OF THE UNITED STATES TO AREAS OUTSIDE 12 NAUTICAL MILES FROM THE UNITED STATES COASTS. THE COAST GUARD, AS THE PRIMARY MARITIME LAW ENFORCEMENT AGENCY AND AS AN ARMED FORCE OF THE UNITED STATES, HAS INSTITUTED APPROPRIATE MEASURES TO TAKE ADVANTAGE OF THIS ENHANCEMENT OF NATIONAL SECURITY. HOWEVER, THE COAST GUARD'S ABILITY TO ENFORCE DOMESTIC LAW TO CONTROL FOREIGN VESSELS BETWEEN 3 AND 12 NAUTICAL MILES WOULD BE ENHANCED IF THE PORT SECURITY ENFORCEMENT AUTHORITY, AND THE APPENDANT SANCTIONS, WERE EXTENDED OUT TO 12 NAUTICAL MILES. THE APPLICABILITY OF 50 U.S.C. 191 WITH REGARD TO FOREIGN-FLAG, AS WELL AS U.S. FLAG VESSELS, IS LIMITED BY DEFINITION TO THE "TERRITORIAL WATERS OF THE UNITED STATES." THE EXTENSION OF THIS AUTHORITY WILL SIGNIFICANTLY ENHANCE THE ABILITY OF THE

COAST GUARD TO PROTECT THE UNITED STATES FROM THREATS TO ITS SECURITY FROM FOREIGN SOURCES.

OF COURSE, ONE OF THE AREAS OF PARAMOUNT IMPORTANCE TO THE COAST GUARD AND THE UNITED STATES IS THE INTERDICTION OF ILLEGAL DRUGS INTO THE UNITED STATES. THERE IS NO INCREASE IN THE COAST GUARD'S JURISDICTION OR ABILITY TO ENFORCE DRUG INTERDICTION LAWS BY EXTENSION OF THE TERRITORIAL SEA EITHER INTERNATIONALLY OR DOMESTICALLY. THIS IS BECAUSE THE GENERAL LAW ENFORCEMENT AUTHORITY OF THE COAST GUARD IS NOT TIED TO STATUTORY DEFINITIONS OF MARITIME LIMITS; INSTEAD OUR AUTHORITY EXTENDS TO WATERS BEYOND THE TERRITORIAL SEAS PURSUANT TO 14 U.S.C. 89. ACCORDINGLY, THE COAST GUARD'S AUTHORITY TO ENFORCE LAWS WILL DEPEND UPON WHETHER A PARTICULAR STATUTE HAS EXTRA-TERRITORIAL EFFECT.

THIS CONCLUDES MY STATEMENT. I APPRECIATE THE OPPORTUNITY TO PRESENT THESE VIEWS FOR YOUR CONSIDERATION AND WILL UNDERTAKE TO ANSWER ANY QUESTIONS YOU MIGHT HAVE.

TESTIMONY OF MICHAEL A. POLING
DEPARTMENT OF THE INTERIOR
DEPUTY ASSISTANT SECRETARY - LAND AND MINERALS MANAGEMENT

House Merchant Marine and Fisheries
Subcommittee on Oceanography and Great Lakes

March 21, 1989

I want to thank the Chairman and members of the Subcommittee for the opportunity to present testimony on the impact of Presidential Proclamation 5928 [December 27, 1988] on authorities and responsibilities of the Department of the Interior. In addition, the Committee has asked that we address any possible changes to existing authorities of the Department that may better enable it to meet its responsibilities.

On August 10th of last year I testified before this Subcommittee (which was then considering H.R. 5069 of the 100th Congress) regarding the views of the Department of the Interior on extension of the territorial sea. At that time, on behalf of the Department, I indicated support for the extension of the territorial sea for international purposes; subsequently, this extension was implemented by the Presidential Proclamation.

As you are aware, the Proclamation extended, for international purposes only, the territorial sea of the United States from 3 nautical miles to 12 nautical miles. Since the declaration in 1793 by then Secretary of State Thomas Jefferson of a 3 geographic mile territorial sea, that has been the limit of the U.S. territorial sea. The recent extension applies to the territorial sea around the 50 States of the Union, the Commonwealth of Puerto Rico, American Samoa, Guam, the U.S. Virgin Islands, the Commonwealth of the Northern Mariana Islands, and all other United States territories and possessions.

However, the proclamation was clear that the President's action does not change the application of United States domestic statutes unless there is further action by Congress. I quote:

> Nothing in this Proclamation:
>
> (a) extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom;

To further assure certainty on this point, the Department would support appropriate legislation clarifying that existing statutes remain unaffected absent subsequent Congressional action.

As you are also aware, the Department of the Interior manages the offshore oil and gas program under the Outer Continental Shelf Lands Act (OCSLA), while the States manage the development of mineral resources off their immediate coasts pursuant to the jurisdictional grant of the Submerged Lands Act (SLA). The jurisdictional provisions of neither the SLA nor the OCSLA employ the term "territorial sea," but clearly define jurisdiction in terms of geographical miles and marine leagues.

The OCSLA defines the OCS as all submerged lands lying seaward of the "lands beneath navigable waters" as defined in the SLA. The SLA specifically states that "in no event shall the term 'boundaries' or the term 'land beneath navigable waters' be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico."

Thus, even if the Proclamation were applicable to domestic law, division of Federal and State authorities for management of offshore minerals resources is clearly not affected by it.

The offshore oil and gas leasing program, administered by the Department of the Interior under the OCSLA, is also affected by the Coastal Zone Management Act (CZMA). The Department of Commerce has primary responsibility for the implementation of the CZMA. We understand that, under the Proclamation, the breadth of the coastal zone was not affected. If, in fact, the Proclamation had affected the breadth of the coastal zone for purposes of the CZMA, we would have had serious concerns. An expansion of the coastal zone so that it overlaps the OCS could create questions concerning jurisdiction in the affected area. We believe this would result in new conflicts related to the leasing and production of OCS mineral resources under the OCSLA. The part of the OCS included in the extended territorial sea accounts for 122 million barrels of oil and 1.065 trillion cubic feet of natural gas, which is about one-third of OCS oil production and about one-fourth of OCS natural gas production. In 1987, this area accounted for about $800 million in direct Federal revenues.

A review is now in progress with respect to the effect of the Proclamation on other activities within the Department.

That concludes my prepared testimony. However, I will be happy to respond to any questions the members of the Subcommittee might have.

JOHN K. VAN DE KAMP
Attorney General

State of California
DEPARTMENT OF JUSTICE

[illegible] WILSHIRE BOULEVARD, ROOM [illegible]
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March 15, 1989 (213) 736-2046

Peter Douglas
Executive Director
California Coastal Commission
631 Howard Street, Fourth Floor
San Francisco, CA 94105

Dear Mr. Douglas:

The Effect of the Presidential Proclamation
Extending the Territorial Sea to 12 Miles on the
Obligations of the California Coastal Commission

On December 27, 1988, President Reagan issued a proclamation extending the seaward boundary of the territorial sea of the United States to twelve miles from the coast line. (Proclamation No. 5928; 54 Fed.Reg. 777.) In a letter dated January 6, 1989, you requested that this office provide you with advice concerning the effect of this proclamation on the obligations and jurisdiction of the California Coastal Commission.

Our general conclusion is that the President's proclamation neither extends the boundaries of the State of California nor does it extend the permit jurisdiction of the Coastal Commission, as granted under the California Coastal Act. (Pub. Resources Code, § 30000, et seq.) However, the President's proclamation does extend from three to twelve miles the seaward boundary of the coastal zone, as defined for federal law purposes in the Coastal Zone Management Act ("CZMA"). This extension of the seaward boundary of the coastal zone does alter the implementation of the consistency provisions of the CZMA because it enlarges the area to which they apply. This change means that more federally conducted or supported activities will directly affect the coastal zone within the meaning of § 307(c)(1) of the CZMA (16 U.S.C. § 1456(c)(1)) and more federally licensed and permitted activities will affect land or water uses in the coastal zone within the meaning of § 307(c)(3) of the CZMA (16 U.S.C. § 1456(c)(3)).

ANALYSIS

I. THE PRESIDENTIAL PROCLAMATION DOES NOT ALTER STATE BOUNDARIES.

The first question raised by the President's proclamation is whether it has any effects on state boundaries, i.e., does the proclamation have any impact on the grant made to California in the Submerged

Lands Act. Our conclusion is that the proclamation does not affect the grant made in the Submerged Lands Act.

In 1947, the Supreme Court held that, as against California, the United States possessed paramount rights in the lands beneath the Pacific Ocean lying seaward of the low-water mark on the coast of California. (United States v. California (1947) 332 U.S. 19.) In response to the Court's decision, Congress in 1953 enacted the Submerged Lands Act. (43 U.S.C. §§ 1301-1315.) Congress there took several related steps. Congress first defined "lands beneath navigable waters" to mean, inter alia,

> "(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographic miles distant from the coast line of each State . . . ." (43 U.S.C. § 1301(a).)

Congress then transferred title to the "lands beneath navigable waters" to the states. (43 U.S.C. § 1311(a).) Congress also allowed each state to establish its seaward boundary at a line three geographic miles from the coast line. (43 U.S.C. § 1312.)[1]

By these means, Congress clearly established that states such as California could have boundaries extending three geographic miles from the coast line and that the states would have ownership and title to the lands underlying the oceans out to that distance. In so doing, Congress did not refer to, or rely upon, the extent of the territorial sea.

The President cannot, by proclamation or otherwise, alter that which Congress enacted in the Submerged Lands Act. In United States v. California, supra, 332 U.S. at 27, the Court addressed just this situation as follows:

> "For Article IV, § 3, Cl.2 of the Constitution vests in Congress 'Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.' We have said that the constitutional power of Congress in this respect is without

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[1] Although not relevant to this discussion, Congress also addressed the boundaries of the states bordering the Great Lakes (43 U.S.C. § 1312) and recognised that certain states on the Gulf of Mexico might have rights to boundaries extending three marine leagues from the coast. (See, United States v. States of Louisiana, etc. (1960) 363 U.S. 1.)

> limitation. [Citation.] *Thus neither the courts nor the executive agencies could proceed contrary to an Act of Congress in this congressional area of national power*." (Emphasis added.)

This makes clear that even if the executive branch desired to do so, it could not by proclamation alter the grant made and the boundaries set by Congress in the Submerged Lands Act. Thus, the territorial sea proclamation does not have the effect of extending the grant made to California in the Submerged Lands Act.

II. THE PRESIDENTIAL PROCLAMATION DOES EXTEND THE SEAWARD BOUNDARY OF THE FEDERAL COASTAL ZONE FROM 3 MILES TO 12 MILES.

The Coastal Zone Management Act defines the seaward limit of the coastal zone as the "outer limit of the United States territorial sea." (16 U.S.C. § 1453(1).) There appear to be at least two means of approaching the analysis of the effect of the President's proclamation on this definition of the seaward boundary of the coastal zone. First, we could assume that whenever Congress used the words "territorial sea" without any limitation or explanation, the reference assumes that the seaward boundary of the territorial sea could move. Under this approach, the extension of the seaward boundary of the territorial sea results in a parallel extension of any boundary set by reference to the territorial sea, including the seaward boundary of the coastal zone. Second, we can examine the structure and legislative history of the CZMA to determine whether Congress contemplated that a change in the territorial sea would alter the seaward boundary of the coastal zone.

As we detail below, regardless of the analysis used, the effect of the President's proclamation is to extend the seaward boundary of the federal coastal zone from three miles to twelve miles from the shoreline. However, both of the analyses will ultimately rely on the manner in which Congress has viewed the territorial sea and the possibility that the seaward boundary could move. Thus, we begin by examining the history of the three-mile limit to the territorial sea and Congress' historical recognition that the seaward extent of the territorial sea could be altered.

A. *Congress Has Long Been Aware That the Seaward Boundary of the Territorial Sea Could Be Altered.*

For most of the first two hundred years of the Nation, the territorial sea of the United States was limited to three miles. In 1793, Thomas Jefferson, as Secretary of State to President Washington, sent notes to the French and English ministers fixing "provisionally" a three-mile territorial sea. (S. Swarztrauber, The Three-Mile Limit of Territorial Seas (1972) at 56-57; hereafter referred to as "Swarstrauber.") Notwithstanding the provisional nature of this three-mile claim, it was not altered until President Reagan's proclamation.[2]

Despite the length of time that the United States has recognized and abided by the three-mile limit of the territorial sea, Congress has also long been aware that the three-mile limit was subject to change.[3] This awareness dates at least from the time of the debates on the passage of the Submerged Lands Act. For example, during the debate on whether the claims of Texas, Louisiana and Florida to broader state boundaries should be recognized, Representative Yates stated as follows:

> "Thirdly, I think it is important that the language be stricken in the interests of our foreign policy. Is it not to our interest to maintain the necessity for a uniform 3-mile limit when we see the Soviet Union today claiming a strip in its territorial sea extending 12 miles from its shore? Mexico claims a boundary extending 9 miles from its shore line. Ecuador claims exclusive fishing rights within 15 miles of its coast. . . .
>
> "Let me read to you from a letter written by [the] Assistant Secretary of State, . . . , which letter was written to the chairman of the Committee on Interior and Insular Affairs of the other body on March 4, 1953. He says:
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> "'A change of position regarding the 3-mile limit on the part of this Government is very likely, as past experience in related fields establishes, to be seized

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[2] The United States Department of Justice has prepared a more complete accounting of the history of the three-mile limit in its opinion concerning the legal issues raised by the proclamation. (See, Memorandum for Abraham D. Sofaer, Legal Adviser, Department of State re: Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea, October 4, 1988, at pp. 2-12; hereafter referred to as the "Justice Memorandum.")

[3] Swarstrauber expresses the view that by 1972 when his book was published, the three-mile limit had passed into history and the twelve-mile limit had emerged as the informally accepted standard. (Swarstrauber at p. xi.) By 1988, one hundred four nations claimed a twelve-mile territorial sea. (Justice Memorandum at 3, fn. 2.)

> upon by other States as justification or excuse for broader or even extravagant claims over their adjacent seas. Hence, a realistic appraisal of the situation would seem to indicate that this Government should adhere to the 3-mile limit until such time as it is determined that the interest of the Nation as a whole would be better served by a change or modification of that policy.'" (99 Cong.Rec. 2567-2568; emphasis added.)

Indeed, throughout the debates on the Submerged Lands Act, the question continually arose of the international effects that would come from a recognition by Congress of the claims by Texas, Louisiana and Florida to boundaries of three marine leagues. For example, in an explanation of an amendment, Senator Magnuson stated:

> "I say that when you pass our historic 3-mile limit in any quit-claim legislation, you invite untold and unknown international complications. It seems to me, therefore, that if Senate Joint Resolution 13 is to be passed at all, it should reserve for future and thorough consideration by the Foreign Relations Committee of the Senate and the Foreign Affairs Committee of the House, this entire question of extending seaward boundaries beyond the 3-mile limit." (99 Cong.Rec. 4474; see also, United States v. Louisiana (1960) 363 U.S. 1, 30-36.)

Other evidence of congressional awareness of the mobility of the seaward boundary of the territorial sea is found in the Senate reports and debates on the 1960 ratification of the Convention on the Territorial Sea and Contiguous Zone. The Convention itself does not establish any particular seaward boundary for the territorial sea. (16 U.S.T. 1606.) This occurred because no proposal could obtain the necessary votes to be adopted. However, during the discussions in Geneva, the United States did propose a compromise pursuant to which six miles would have been adopted as the international limit for the territorial sea with an additional fisheries zone between six and twelve miles. This compromise also failed to achieve the necessary votes to be adopted.

In the Senate committee report on the Convention, however, specific reference was made to the United States' compromise and the fact that it had received nearly enough votes to be adopted. (106 Cong.Rec. 11189-90.) Additionally, Senator Mansfield, in presenting the committee report and the Convention to the Senate, also made specific reference to the failed compromise. (106 Cong.Rec. 11187.)

Further indications of congressional awareness of the potential mobility of the three-mile limit are found in legislation which has been introduced to extend the territorial sea. For example, in 1964 Representative Downing introduced legislation to extend the seaward limit to twelve miles. (H.R. 10492, March 18, 1964, "A Bill Extending the National Sovereignty of the United States over Certain Waters.") In 1968, Senator Griffin attempted to amend a pending Senate bill with a provision which would have allowed the territorial sea to vary in width, while still limiting its most seaward extent to twelve miles. (114 Cong.Rec. 8872-8873; April 3, 1968.) Obviously, neither piece of legislation was enacted, but they again illustrate that Congress has long been aware that the three-mile limit was not fixed in stone.[4]

Finally, it is should be noted that even prior to the President's 1988 proclamation, the United States had asserted jurisdiction beyond three miles for a variety of purposes. Thus, since the early days of the Republic, the United States has claimed the right to exercise jurisdiction over domestic and foreign vessels out to four marine leagues (about 12 miles) for customs purposes. (1 Stat. 164, 648, 668; 19 U.S.C. § 1401 (j); see also Anti-Smuggling Act of August 5, 1935, 49 Stat. 517, 19 U.S.C. §§ 1701-1711, extending customs jurisdiction to 62 miles.) In 1945, President Truman issued the Outer Continental Shelf proclamation which extended the jurisdiction of the United States to the seabed and subsoil beyond three miles. (Proclamation No. 2667, "Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf," 10 Fed.Reg. 12303, September 28, 1945.)[5]

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[4] The degree of flux surrounding the three-mile boundary is also illustrated in reference works such as A.L. Shalowitz, *Shore and Sea Boundaries* (1962), Appendix J (listing the territorial sea claims by various nations), and Swarztrauber, at pages 131-252.

[5] In Swarztrauber's opinion, the Truman proclamation on the Outer Continental Shelf was the single event which provided the incentive to many nations, especially in Latin America, to assert territorial seas of 200 miles. (Swarztrauber, at p. 155-69.) Additionally, by 1970 the United States and the Soviet Union had at least informally agreed on a twelve-mile limit to the territorial sea. Indeed, during 1968 and 1969, the two superpowers went so far as to prepare and circulate a draft convention which would have

This review of the three-mile limit provides a context for the discussions which follow. It shows long-standing congressional awareness that the seaward extent of the territorial sea was variable and that the United States might well adopt a broader territorial sea. As we discuss, *infra*, notwithstanding this awareness, Congress still enacted provisions--such as the definition of the coastal zone in the CZMA--which referred simply to the territorial sea without any further explanation or limitation.

B. Congressional References to the "Territorial Sea," Unless Expressly Limited, Should Now Be Treated as Referring to the Twelve Mile Territorial Sea.

As noted *supra*, one approach to the analysis of the impact of the President's proclamation is to treat all references to the "territorial sea," unless expressly limited, as now referring to the twelve-mile territorial sea. There are several sources of support for this approach.

First, as already explained, Congress has been aware since at least the hearings and debates on the Submerged Lands Act of 1953 that the seaward boundary of the territorial sea was subject to change. Given the abundance of evidence on this point, one can justly conclude, at least as to statutes passed after these hearings and debates, that when Congress made reference to "territorial sea," it knew that the three-mile limit was subject to change and took this knowledge into account when using such language.

Second, Congress has shown that it is fully capable of limiting the reach of the territorial sea when it so desires. Thus, in the Federal Water Pollution Control Act Amendments of 1972, Congress defined "navigable waters" to mean the waters of the United States including the territorial seas. (33 U.S.C. 1362(7); 86 Stat. 886.) Congress then defined "territorial seas" as follows:

> "The term 'territorial seas' means the belt of the seas measured from the line of ordinary low water ..., and *extending seaward a distance of three miles*." (33 U.S.C. 1362(8); 86 Stat. 886.)

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established the twelve-mile limit for the territorial sea. (Swarstrauber at pp. 244-248.)

Thus, Congress clearly demonstrated its ability to limit the breadth of the territorial sea to three miles when it chose to do so. This brings us to two rules of statutory construction. First, the courts assume that legislators know the law. (See Cannon v. University of Chicago (1979) 441 U.S. 677, 696-97.) Second, where Congress includes language in one provision and does not include it in another comparable provision, it is presumed that Congress acted intentionally and purposefully. (See Russello v. United States (1983) 464 U.S. 16, 23.)

Under the circumstances presented here, we can conclude that Congress was long aware of the possibility that the seaward boundary of the territorial sea might be extended, and that when Congress wished to limit the extent of the territorial sea for domestic law purposes, it knew how to do so explicitly. Therefore, given the absence of any such limitation in the Coastal Zone Management Act, we must conclude that with the President's proclamation extending the territorial sea, the seaward boundary of the federally defined coastal zone also moved to twelve miles from shore.

C. The Legislative History of the Coastal Zone Management Act Indicates That Congress Contemplated That an Extension of the Territorial Sea Would Also Extend the Coastal Zone.

In its memorandum, the United States Department of Justice approaches the analysis of the effect of the proclamation on the definition of the coastal zone by turning to the legislative history of the CZMA. The Justice Department's goal is to determine whether Congress, in enacting that statute in 1972 and therein defining the coastal zone, intended that the seaward boundary of the coastal zone would move if the seaward boundary of the territorial sea moved. This is a reasonable approach and one that has some support from the courts in roughly analogous circumstances. (See, e.g., Natural Resources Defense Council, et al. v. U.S.E.P.A. (9th Cir. 1988) 863 F.2d 1420, 1434-36.)[6]

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[6] The Justice Department takes the position that in order to determine the effect of the proclamation on any particular statute, one must examine the statute and determine what Congress intended. Thus the examination of legislative intent is the key to determining the effect on domestic law. (Justice Memorandum at p. 23.) The Justice Department adopted this position notwithstanding its belief that the proclamation would, by its own terms, make clear that it was not intended to affect domestic law. (Id.) The proclamation in fact does state that nothing in it "extends or otherwise alters existing

The Justice Department reviewed the legislative history of the CZMA and reached the conclusion that Congress did not intend a change in the breadth of the territorial sea to affect the breadth of the coastal zone. While the Justice Department did identify the pertinent legislative history, we believe that a more appropriate reading of that legislative history leads to the contrary conclusion, i.e., Congress did intend that the breadth of the federally-defined coastal zone be affected by a change in the breadth of the territorial sea.[7]

Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom; . . . .' It is clear, however, that if Congress intended that a statute be affected by a change in the breadth of the territorial sea, the President by proclamation cannot alter that intent. (United States v. California, supra, 332 U.S. at p. 27.) Thus, the disclaimer in the proclamation has no real effect on existing federal law. In fact, the use of the disclaimer conflicts with the analytic approach used by the Justice Department. In any event, if the disclaimer were to be given effect, the President would have created a new form of territory--a form of territory subject to neither domestic law nor international law. Such an anomalous creation obviously would pose serious problems for federal agencies. These problems are illustrated by several recent actions of the Federal Aviation Administration which extended domestic law out to twelve miles notwithstanding the disclaimer in the proclamation. (See 54 Fed.Reg. 260-61; 54 Fed.Reg. 264-66.)

[7] One of the difficulties with the Justice Memorandum is that it fails to acknowledge accurately congressional knowledge of the status of the three-mile limit at the time the CZMA was enacted. Thus Justice states, "Congress could not have known whether these findings would also be true of other areas over which the United States might assert its jurisdiction or sovereignty. Different conditions obviously could hold depending upon whether the President asserted a territorial sea of three, twelve, or two hundred miles." (Justice Memorandum at p. 26.) However, by 1972 the twelve-mile limit was more accepted than the three-mile zone, and the United States was even negotiating treaty language with the Soviet Union recognizing the twelve-mile limit. (Swarztrauber at pp. 246-47.) Statutes are practical documents which should not be construed in the abstract without taking into consideration the historical framework in which they exist. (Sutherland Stat. Const. § 49.01 (4th Ed.) The congressional awareness of the possibility of a change in the breadth of the territorial sea adds further support to our interpretation of the legislative history of the CZMA.

Initially, both the House and the Senate versions of the CZMA defined the seaward limit of the coastal zone as the outer limit of the territorial sea. (S.Rep. 92-753, 2d Sess. 47 (1972); H.Rep. 92-1049, 2d Sess. 2, (1972).)[8] The Senate report explained its provision by stating only, "The outer limit of the zone is the outer limit of the territorial sea, beyond which the States have no clear authority to act." (S.Rep. 92-753, *supra*, CZMA Leg. History at p. 201.)

During the Senate debate on S. 3507, Senator Spong proposed, and the Senate adopted, an amendment which changed the definition of coastal zone to read in pertinent part,

> "The zone terminates, in Great Lakes waters, at the international boundary between the United States and Canada and, in other areas, extends seaward to the outer limit of the legally recognized territorial seas of the respective coastal states, but *shall not extend beyond the limits of State jurisdiction as established by the Submerged Lands Act of May 22, 1953, and the Outer Continental Shelf Lands Act of 1953*." (CZMA Leg. History at p. 288; emphasis added.)

Senator Spong explained that the purpose of his amendment was to insure that the legislation did not prejudice the rights of the Atlantic seaboard states then involved in litigation against the United States over title to the lands and natural resources more than three miles from the coast line. (*Id.*, at pp. 288-89.)

The limitation in the Spong amendment is quite important for our analysis. Had the amendment been included in the CZMA as finally enacted, its limitation of the coastal zone to the areas of state jurisdiction established in the Submerged Lands Act would have clearly restricted the coastal zone to three miles for most areas and three marine leagues for Texas and portions of the Florida coast. Such an explicit limitation would have ended any question of an extension of the territorial sea resulting in a parallel extension of the coastal zone. However, the language adopted by the Senate did not survive into the final enactment.

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[8] All further references to the legislative history of the CZMA will be to that history as reprinted in *Legislative History of the Coastal Zone Management Act of 1972, as Amended in 1974 and 1976 with a Section-by Section Analysis*, U.S. Government Printing Office (1976). This document will hereafter be referred to as the "CZMA Leg. History."

The House explained its definition of the outer limits of the coastal zone as follows:

> "As to the outer and inner limits of the zone, it extends outward, in the Great Lakes area, to the international boundary between the United States and Canada and, in other areas bordering on the oceans, seas, gulfs, and sounds, to the outer limits of the territorial sea which, under the present posture of international law, means 3 miles from the base line from which the territorial sea of the United States is measured. Should the United States, by future action, either through international agreement or by unilateral action, extend the limits of the U.S. territorial sea further than the present limits, the coastal zone would likewise be expanded, ..." (H.Rep. 92-1049, supra, CZMA Leg. History at p. 317; emphasis added.)

The House of Representatives thus clearly contemplated that the outer limit of the territorial sea could change and that such a change would result in a similar expansion of the outer limit of the coastal zone.

In the Conference Committee, the House definition of the coastal zone was adopted. The Conference Committee explained its action as follows:

> "The managers agreed to adopt the House language as the seaward extent of the coastal zone, because of its clarity and brevity. At the same time, it should be made clear that the provisions of this definition are not in any way intended to affect the litigation now pending between the United States and the Atlantic coastal States as to the extent of State jurisdiction. Nor does the seaward limit of the coastal zone in any way change the State or Federal interests in resources of the territorial waters or Continental Shelf, as provided for in the Submerged Lands Act and the Outer Continental Shelf Lands Act." (H.Conf.Rep. 92-1544, 2d Sess. (1972); CZMA Leg. History at p. 455; emphasis added.)

The Conference Committee report thus answers three questions. First, as to the seaward extent of the coastal zone, it adopted the House language, and implicit in this action is an acceptance of the explanation of that language found in the House report.[9] Second, the conferees made clear that they did not want to affect the litigation between the Atlantic coast states and the United States.[10] Finally, the conferees made clear that the definition of the coastal zone did not alter the division of the interests in the *resources* of the territorial sea and the Outer Continental Shelf as enacted in the Submerged Lands Act and the Outer Continental Shelf Lands Act.[11] The conclusion we draw from the legislative history is that Congress considered the question of whether an expansion of the territorial sea would affect an expansion of the coastal zone, and Congress concluded that it would.

Further support for our conclusion is found in the Federal Water Pollution Control Act Amendments of 1972. As noted *supra*, Congress there defined "navigable waters" of the United States in terms of the territorial sea and then expressly limited the territorial sea to three miles. The difference in approach between these two environmental statutes, enacted in the same year, must have some meaning. At a minimum, it shows that when Congress wanted to limit the breadth of the territorial sea for domestic law purposes, it knew how to do so explicitly.

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[9] "Concerning those parts of the bill passed as introduced by the committee without change, it is reasonable to assume that the legislature adopted the intent of the committee." (Sutherland Stat. Const. § 48.06 (4th ed.).)

[10] That litigation resulted in the Supreme Court holding that the United States was entitled to exercise sovereign rights over the seabed and subsoil underlying the Atlantic Ocean more than three miles from shore. (*United States v. Maine* (1975) 420 U.S. 515.) The Court based its ruling on *United States v. California, supra*, 332 U.S. 19, and on the rights conveyed in the Submerged Lands Act and the Outer Continental Shelf Lands Act.

[11] Justice concludes that while the conferees adopted the House language, they also adopted the limitation on the seaward extent of the coastal zone which had been explicit in the Spong amendment. (Justice Memorandum at p. 31.) We believe that this is a very strained reading of the legislative history. The Spong amendment expressly limited the geographic scope of the coastal zone while the language used by the conference committee made reference only to not disturbing the allocation of the resources crafted in the Submerged Lands Act and the Outer Continental Shelf Lands Act. The language of the conferees cannot be read as a substitute for the explicit limitation found in the Spong amendment.

Presumably, if Congress had so intended to limit the definition of the coastal zone, it would have done so expressly. Instead, Congress made a clear choice not to limit the extent of the coastal zone in the same fashion that it had limited the extent of "navigable waters."[12] (See *Russello v. United States*, *supra*, 464 U.S. at p. 300.)

We recognize that our conclusion is different from that of the Justice Department. However, we do not believe that the statements of individual legislators on which the Justice Department relies can be used to negate the House report and the Conference Committee report.[13] Moreover, although the Senate version of the bill contained a definition of the coastal zone which would have clearly limited it to those lands transferred to the states in the Submerged Lands Act, the Conference Committee declined to adopt the Senate language.[14]

We recognize that statements by some members of Congress do create a degree of confusion concerning the intent of Congress with regard to the separation between the territorial sea and the Outer Continental Shelf. While these statements might be used to create an argument contrary to ours, we believe that our conclusion has far better support.[15] In particular, we believe it is better practice in such circumstances to rely on the committee reports, and those reports indicate an expectation that changes in the breadth of the territorial sea would result in parallel changes in the breadth of the coastal zone.[16]

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[12] In *Natural Resources Defense Council v. U.S.E.P.A.*, *supra*, 863 F.2d at 1436, the Ninth Circuit noted that in the definition of the territorial sea in the Clean Water Act, ". . . Congress consciously defined the term 'territorial seas' to make clear the jurisdictional limits of this particular legislation, and its relationship to other statutes."

[13] In attempting to determine legislative intent, it is well-settled that the committee reports are the most important sources. (See, e.g., *Mills v. United States* (7th Cir. 1983) 713 F.2d 1249, 1252; *Lewis v. Sporck* (N.D. Cal. 1985) 612 F.Supp. 1316, 1330.)

[14] Several of the statements on which the Justice Department relies were made in support of the Spong amendment which was deleted in conference in favor of the House language. (E.g., statements of Senators Hollings and Moss referenced at page 29 of the Justice Memorandum.) The other statements to which the Justice Department refers were made during the debates on provisions other than the definition of the coastal zone and thus cannot be used to overcome the clear language of the House report. (*Id.*, at p. 30.)

The Justice Department also relies on Secretary of the Interior v. California (1984) 464 U.S. 312, to support its conclusion that the proclamation does not result in an expansion of the coastal zone. The Justice Department reads Secretary of the Interior v. California to indicate that Congress intended that the coastal zone always be completely distinct from the Outer Continental Shelf, and therefore, Congress could not have intended that the seaward boundary of the coastal zone be expanded. In Secretary of the Interior v. California, the Court did make reference to many of the statements by members of Congress which give rise to the confusion we have noted. However, for several reasons, we believe that our conclusion has the greater support in the history of the CZMA. First, the Court never addressed that portion of the definition of the coastal zone at issue here, and thus the Court never examined the legislative history of that provision. Second, if Congress had wanted to separate the territorial sea and the coastal zone from the Outer Continental Shelf, it could have done so explicitly, as it did in the Federal

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[15] It should be noted that Congress, in effect, reaffirmed the definition of the coastal zone found in the 1972 CZMA by adopting it in the 1978 amendments to the OCS Lands Act. (See 43 U.S.C. § 1331(e).) Given the history of § 1453(1) in 1972, i.e., the adoption of the Spong amendment by the Senate and its subsequent rejection in conference, the 1978 amendments to the OCS Lands Act provided a clear opportunity for Congress to address any concerns about the "coastal zone" potentially overlapping the OCS. Instead, Congress placed the CZMA's definition into the OCS Lands Act. This action indicates that Congress could not, in fact, have been worried about the potential overlap of the two zones.

[16] Many cases have held that the remarks by individual legislators during the debates do not control statutory interpretation and usually are not given significant weight. (See e.g., Blitz v. Donovan (D.C.Cir. 1984) 740 F.2d 1241, 1247.) It is also well-established that where there is a conflict between the committee reports and floor statements made during debate, the reports should prevail in statutory construction. (See, In re Kelly (9th Cir. 1988) 841 F.2d 908, 912, fn. 3; American Mining Congress v. Thomas (10th Cir. 1985) 772 F.2d 617, 629, fn. 8; Crown Cent. Pet. Corp. v. Federal Energy Admin. (TECA 1976) 542 F.2d 69, 74.)

Water Pollution Control Act Amendments of 1972, or by adopting the Spong amendment, or by adopting a different definition in the 1978 amendments to the Outer Continental Shelf Lands Act. It chose not to take any of these steps notwithstanding the clear statement in the House report that if the territorial sea expanded, the coastal zone would also expand.[17]

The statements in the debates indicating that some members of Congress wished to insure the separation of the territorial sea and the Outer Continental Shelf seemed to be based upon a general concern that without such separation, inconsistent state and federal statutory schemes would apply, i.e., without such separation, state law might apply directly on the Outer Continental Shelf. (See, e.g., Secretary of the Interior v. California, supra, 464 U.S. at p. 329, fn. 14.) These concerns would be more troubling here if the expansion of the territorial sea, and thus of the coastal zone, resulted in a major alteration in the regulatory balance between the states and the federal government. However, as we discuss in greater detail below, the expansion of the coastal zone, as defined for federal law purposes in the CZMA, does not extend the reach of state permit jurisdiction. Instead, the expansion results in only an enlargement of the area to which the federal consistency provisions of the CZMA (16 U.S.C. § 1456) apply.

C. The Structure and Purposes of the CZMA Support the Conclusion That the Seaward Boundary of the Coastal Zone was not Restricted to Three Miles.

In its memorandum, the Justice Department asserts that the purposes and structure of the CZMA indicate that Congress intended the coastal zone to be stationary. This Justice argument is premised on two major points. First, Congress made findings in enacting the CZMA which were based on empirical observations of the coastal zone as it existed at the time the CZMA was enacted. Second, it is unlikely that Congress would have intended the CZMA's scope to extend beyond the clear limit of the states' jurisdiction. (Justice Memorandum at pp. 25-28.) In our view, however, the purposes and the structure of the CZMA support our conclusion.[18]

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[17] In light of the status in 1972 of the three-mile limit to the territorial sea, Congress must have anticipated that any expansion in the territorial sea would have been to a twelve mile wide zone. Such an expansion would obviously have overlapped the Outer Continental Shelf.

Initially, it must be recognized that the congressional findings in the CZMA provide no evidence that Congress was referring to a specifically limited geographic area. There is no indication that the "empirical observations" were based on a finding or assumption that the coastal zone would extend only three miles from shore. Instead, Congress simply makes numerous references to the "coastal zone." Given § 1453(1) and its legislative history, such references must be interpreted to have been made with the recognition that the coastal zone could expand.

One must also look beyond these reference to the resources which Congress to preserve and protect. Many of these resources do not respect arbitrary lines drawn on maps. For example, Congress found:

> "The increasing and competing demands upon the lands and water of our coastal zone occasioned by population growth and economic development, including . . . extraction of mineral resources and fossil fuels, transportation and navigation, waste disposal, and harvesting of fish, shellfish, and other *living marine resources, have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems*, ..." (16 U.S.C. § 1451(c); emphasis added.)

Similarly, in § 1451(d), Congress found that the coastal zone and the fish and other living marine resources in it are ecologically fragile and vulnerable to man's alterations. These findings deal with resources which effect the waters adjacent to the coast without respecting a three-mile, or even a twelve-mile, limit. Given, however, that it was Congress stated policy to preserve and protect these resources (16 U.S.C. § 1452(1)), it was completely reasonable for the Act to contemplate that some form of management would extend to the limit of the Nation's sovereignty regardless whether that limit was at three miles or at twelve miles. Perhaps the clearest example of this is found in the Santa Barbara Channel. The Channel is a defined area which for environmental purposes must be considered as a unit. The 1969 Santa Barbara oil spill from Union Oil's Platform A affected the entire Channel, as do other activities.

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[18] As we have already shown, *supra*, the legislative history of § 1453(1) is quite contrary to this Justice argument.

This functional approach to managing the resources of the coastal zone is actually reflected in the definition of the coastal zone. There Congress stated, "The term 'coastal zone' means the coastal waters (including the lands therein and thereunder) and the adjacent shorelands . . . , strongly influenced by each other . . . ." (16 U.S.C. § 1453(1).) While the degree to which the lands and waters strongly influence each other depends on the particular lands and the resource at issue, it is clear that the influences cross jurisdictional boundaries, e.g., schools of fish move in relation to the nutrients on which they feed and not in relation to the seaward boundary of a state.[19] In light of the congressional findings and the policy of managing the coastal zone in order to preserve and protect its resources, it was completely reasonable for Congress to have intended that the coastal zone extend to the limits of the Nation's sovereignty. By such means, Congress would have ensured that the largest possible area was being brought within the ambit of the CZMA and its management goals.

The Justice Department argument also fails to acknowledge the historic situation that existed in 1972 concerning the three-mile limit to the territorial sea. By 1972, the three-mile limit was no longer the accepted standard for the territorial sea. Many other nations had chosen to assert sovereignty over wider areas, and the twelve-mile limit was rapidly becoming the accepted standard. If Congress intended to limit its review to a three-mile wide coastal zone, surely it would have so stated--especially given the questionable status of the three-mile limit in 1972.

Similarly, if Congress had intended to limit the coastal zone to that area encompassed by state boundaries and jurisdiction, it knew that it had to so state explicitly. An express statement was required because by 1960 Texas and Florida had successfully asserted that the Submerged Lands Act granted to them state boundaries extending three marine leagues from the coast.

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[19] This interrelationship between the lands, waters and resources which are to be preserved and protected provided one basis for the inclusion of the consistency provisions (16 U.S.C. § 1456) in the CZMA. Congress recognized that regardless of where they were occurring, federal activities, or federally permitted activities, could have impacts on the coastal resources which are to be protected. In order to prevent these activities from undermining the CZMA, Congress enacted the consistency provisions.

(United States v. Louisiana, supra.)[20] These boundaries for Texas and Florida were not coterminous with either the territorial sea or the coastal zone as defined in the CZMA. In light of this situation, it is clear that the definition of the coastal zone in the CZMA was not fixed by reference to areas of state jurisdiction. (See also, 15 C.F.R. § 923.32(b).)[21]

Finally, if the extension of the territorial sea did not extend the coastal zone, then the President would have created a situation in which the language of a statute was rendered meaningless. That is, "territorial sea" as used in the statute would no longer mean "territorial sea" but only the first three miles of the territorial sea. Thus, the President would be adding a limitation to the CZMA which the Congress expressly chose not to add. As the Supreme Court stated in United States v. California, supra, 332 U.S. at 27, when Congress enacts legislation dealing with federal property, neither the executive nor the courts can alter that action. Therefore, based on our review of the evidence, we believe the proper conclusion is that when the President extended the seaward boundary of the territorial sea from three miles to twelve miles, the seaward boundary of the coastal zone, as defined in 16 U.S.C. § 1453(1), was also extended to twelve miles.

III. THE EXTENSION OF THE FEDERALLY DEFINED COASTAL ZONE DOES NOT EXTEND THE STATE COASTAL ZONE OR EXTEND STATE PERMIT JURISDICTION.

Having determined that the Presidential proclamation extending the seaward boundary of the territorial sea also has the effect of extending the seaward boundary of the coastal zone, the question becomes one of determining the effect of this extension on the Coastal Commission and its obligations. Here we discuss our conclusion that the extension of the federally defined coastal zone alters neither the state coastal zone nor the Commission's state law permit authority.

For state permitting purposes, the coastal zone is defined in the Coastal Act as extending seaward to the "state's outer limit of jurisdiction." (Pub. Resources Code, § 30103(a).) In an opinion issued in 1980, the Attorney General interpreted this provision to limit the seaward extent of the state coastal zone to the seaward boundary of the state contained in Article 12 of the California Constitution of 1849, as amplified in Government Code § 170. (63 Ops.Cal.Atty.Gen. 107.) This limitation had the effect of generally restricting the state defined coastal zone to three miles. Pursuant to the Coastal Act, the Commission's permit authority over coastal development applies only in the state defined coastal zone. (Pub. Resources Code, §§ 30600, 30604(d).) Thus, we conclude that the extension of the federally defined coastal zone does not affect the state permit authority of the Commission. This conclusion is buttressed by the fact that the definition of the coastal zone found in the Coastal Act makes no reference to, and does not rely upon, the extent of the territorial sea.

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[20] As noted, supra, the courts assume that legislators know the law. (Cannon v. University of Chicago, supra, 441 U.S. at pp. 696-697.)

[21] Of course, adoption of the Spong amendment by the entire Congress would have served the end of limiting the coastal zone to areas of state jurisdiction.

Although this conclusion is quite clear, there are several anomalies about the situation which should be noted. First, the state political boundaries as defined in the 1849 Constitution do not exactly coincide with the lands granted to the State in the Submerged Lands Act. For example, the 1849 Constitution includes within the political boundaries of the State all of Santa Monica Bay within a closing line drawn from Point Dume to Point Fermin. In contrast, under the Submerged Lands Act, the state boundary in Santa Monica Bay is set by a line three miles from shore which parallels the coast.

Second, given the above-noted anomaly, it is also the case that the state defined coastal zone has never exactly coincided with the federally defined coastal zone, i.e., the state coastal zone was never the same as the territorial sea. That this might be so was fully expected by Congress in 1973 when it enacted the CZMA. As noted in the Senate report, "No single geographic definition [of the coastal zone] will satisfy the needs of all coastal States." (S.Rep. 92-753, as reprinted CZMA Leg. History at 201.)

These two anomalies emphasize that the limitations on the state coastal zone, as defined in the Coastal Act, have no impact on the federal definition of the coastal zone. The state and federal definitions have always been different.

IV. THE EXTENSION OF THE FEDERALLY DEFINED COASTAL ZONE DOES EFFECT THE CONSISTENCY PROVISIONS OF THE CZMA.

Although we have concluded that the extension of the federally defined coastal zone does not extend the Commission's state law permit jurisdiction, we do find that the change in the seaward boundary of the coastal zone will have an impact on the implementation of the consistency provisions of § 307 of the CZMA (16 U.S.C. §§ 1456(c), 1456(d)).

The consistency provisions of the CZMA were adopted by Congress to insure that the activities conducted or supported by federal agencies, or activities licensed or permitted by federal agencies, would not undermine the coastal zone programs prepared by the states and approved by the federal government. While the parts of § 307(c) operate somewhat differently, they are all primarily concerned with effects which impact on the coastal zone, regardless of where the activity causing the effect is located. Thus, § 307(c)(1) deals with federal activities which "directly affect" the coastal zone while § 307(c)(2) deals with federal development projects in the coastal zone. The main point of concern is whether the activity is having a coastal zone effect.

It seems clear that the federal consistency provisions apply to any area encompassed within the coastal zone as defined in § 1453(1). Nowhere in the CZMA does Congress express an intent that the consistency provisions be restricted to some area other than the federally defined coastal zone. Also, it is worth emphasizing that the definition of the seaward boundary of the coastal zone found in the CZMA is dependent only on the territorial sea. There is no other limitation such as a reference to the lands transferred by the Submerged Lands Act or to any definition of the coastal zone found in state law. Similarly, the legislative history of the CZMA does not link the consistency provisions to any geographic area other than the coastal zone as defined in § 1453(1). (See, e.g., CZMA Leg. History at 210-11, 322-24, 762-63, 938-39.) Finally, there is no indication that the consistency provisions would be restricted if a state were managing a coastal zone which was more limited than that defined in § 1453(1).

In our view, the President's proclamation does not alter the nature of the basic relationship between the states and the federal government. It necessarily means, however, that with the extension of the seaward boundary of the coastal zone, the area subject to the consistency provisions is also extended.[33] To understand the impact of this extension of the area subject to the federal consistency provisions, we must look at each of the most frequently used of the consistency provisions, i.e., §§ 307(c)(1), 307(c)(3)(A) and 307(c)(3)(B).

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[33] We do not believe that the portion of the definition of the coastal zone which excludes federal lands is pertinent to our discussion. First, in Secretary of the Interior v. California, the Court indicated that it was federal activities on just these lands to which § 307(c)(1) applied. (See 464 U.S. at 330.) Second, neither §

Section 307(c)(1) requires federal agencies conducting or supporting activities which "directly affect" the coastal zone to conduct or support those activities in a manner which is consistent to the maximum extent practicable with federally-approved state coastal management programs. Pursuant to NOAA's regulations, this provision applies to federal activities occurring within, landward or seaward of the coastal zone. (15 C.F.R. § 930.33.)[23] There are two possible effects on the applicability of § 307(c)(1).

First, if we assume that all federal agencies will follow NOAA's regulations, then the physical location of the activity is not important; the critical question is whether the activity causes a direct affect in the coastal zone. Obviously, if the coastal zone extends to twelve miles from the coast, there is a greater likelihood that federal activities occurring further from shore will directly affect the coastal zone.

Second, notwithstanding NOAA's regulations, some federal agencies either have taken the position that § 307(c)(1) applies only to federal activities occurring within the coastal zone (see, e.g., 54 Fed.Reg. 2046, addressing leasing and development of non-oil and gas minerals on the Outer Continental Shelf and in the exclusive economic zone), or have indicated that they believe the matter is open to question (see, e.g., 53 Fed.Reg. 14905, Army Corps final rule on discharge of dredge material into the waters of the United States). We do not agree with the assertions of federal agencies which attempt to limit the scope of § 307(c)(1) to federal activities occurring within the coastal zone or to raise questions about its scope. However, if we assume for the sake of argument that they are correct, then the extension of the

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307(c)(3)(A) nor § 307(c)(3)(B) has ever been limited to federal licenses or permits for activities on federal lands within the coastal zone. Such an interpretation would be contrary to the plain meaning of these provisions.

[23] The single exception to this requirement is Outer Continental Shelf lease sales. The Supreme Court held in Secretary of the Interior v. California, supra, that such sales are not subject to § 307(c)(1). NOAA's regulations now reflect this exception. (15 C.F.R. § 930.33(c)(2).)

seaward boundary of the coastal zone also extends from three to twelve miles offshore the area which is subject to § 307(c)(1). Federal activities such as EPA's designation of dredge spoil disposal sites and Army Corps dredge and disposal activities are examples of federal actions which are likely to be affected by such an expansion of the area subject to § 307(c)(1).

A similar situation exists regarding § 307(c)(3)(A). Standing alone, § 307(c)(3)(A) requires applicants for non-Outer Continental Shelf oil and gas federal licenses and permits to certify that their activities which will affect land or water uses in the coastal zone will be conducted in a manner consistent with federally-approved state coastal programs. As with § 307(c)(1), the provision applies regardless of the geographic location of the permitted activity.[24] If federal agencies respect this approach, then the only change wrought by extending the seaward boundary of the coastal zone would be to extend the area potentially affected by the applicant's project, i.e., federally-permitted projects occurring in the coastal zone or more than twelve miles from shore are more likely to affect a land or water use in the coastal zone and thus be subject to consistency review.

The Justice Department, however, has recently begun an attempt to expand the range of areas affected by Secretary of the Interior v. California. For example, in its memorandum, the Justice Department states, "We also believe that section 307(c)(3) of the original Act, 16 U.S.C. 1456(c)(3)(A), did not, as originally enacted, apply to activities seaward of the coastal zone." (Justice Memorandum at p. 33, fn. 46.) While Justice indicates that it is not making a definitive statement on this point at this time (id.), the Minerals Management Service has already relied on this footnote to assert that non-Outer Continental Shelf oil and gas activities occurring seaward of the coastal zone are not subject to CZMA review and consistency concurrence. (54 Fed.Reg. 2064.)

We disagree with the statement of the Justice Department and the assertion of the Minerals Management Service concerning the scope of § 307(c)(3)(A). However, assuming for the sake of argument that the Justice Department is correct, the extension of the seaward boundary would expand from three to twelve miles offshore the area to which § 307(c)(3)(A) would apply. Again, assuming that Justice is correct, the disposal of dredge spoils eleven miles offshore in Half Moon Bay by the Port of Oakland pursuant to an Army Corps permit is an example of an activity which would not have been covered by § 307(c)(3)(A) before the proclamation but would be covered now.

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[24] Of course, the state program must comply with NOAA's listing requirements. (See, 15 C.F.R. § 930.53(b).) NOAA's approval of the California Coastal Management Program establishes the program's compliance with the regulations.

Finally, the extension of the seaward boundary of the coastal zone will impact on the manner in which § 307(c)(3)(B) is administered. Section 307(c)(3)(B) applies the consistency review and concurrence procedures of the CZMA to Outer Continental Shelf oil and gas exploration plans and development and production plans. By its own terms, § 307(c)(3)(B) already applies to activities which occur more than three miles from shore. However, with the proclamation, those Outer Continental Shelf oil and gas activities occurring between three and twelve miles from shore will be in the coastal zone itself, and effects of these activities which might not have been subject to consistency in the past will now need to be reviewed to determine their effects on the expanded coastal zone. For example, at times in the past, the Coastal Commission has found that the discharge of drilling muds and cuttings had no coastal zone effects if the discharge occurred sufficiently far from the three-mile limit of the coastal zone. At a minimum, the Commission must review the effects of all such discharges for Outer Continental Shelf projects within twelve miles of shore because the discharges will be directly into the coastal zone. Additionally, it is possible that Outer Continental Shelf projects occurring more than twelve miles from shore will now have effects, or will have greater effects, on land or water uses in the coastal zone.

Similarly, with this proclamation, virtually all of the Santa Barbara Channel is within the territorial sea and thus within the coastal zone. Impacts on fisheries which might have escaped consistency review before will now have to be tested against the state's coastal management program.

To recapitulate, in our opinion, the extension of the seaward boundary of the coastal zone does impact on the implementation of the consistency provisions of the CZMA. The extension of the coastal zone does not alter the basic relationship between the state and the federal government, but it does expand the area which will be subject to the consistency provisions. Thus, more federally supported or conducted activities will directly affect the coastal zone, and more federally permitted or licensed activities will affect land or water uses in the coastal zone.

CONCLUSION

In sum, it is our opinion that the effect on the Coastal Commission of the President's proclamation extending the territorial sea is limited to the consistency provisions of the CZMA. The proclamation neither alters the grant made to the state in the Submerged Lands Act nor extends the state's permit jurisdiction. However, the proclamation does have the effect of extending to twelve miles the seaward boundary of the coastal zone, and this change in the seaward boundary of the coastal zone has an impact on the implementation of the CZMA by enlarging the area subject to the consistency provisions.

Very truly yours,

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STATEMENT OF REPRESENTATIVE NANCY PELOSI BEFORE THE SUBCOMMITTEE ON OCEANOGRAPHY COMMITTEE ON MERCHANT MARINE AND FISHERIES

March 25, 1989

Mr. Chairman, Members of the Subcommittee:

Thank you for the opportunity to present my statement concerning H.R. 1405, the Territorial Sea Extension Act of 1989, for the hearing record today.

A number of issues have been raised relative to Proclamation Number 5928 signed by President Reagan on December 27, 1988, and its effect on existing federal statutes. As a Member of Congress representing a California coastal district, I am particularly interested in this issue.

At a time when the future of offshore California and its preservation are at stake in discussions relating to Outer Continental Shelf Lease Sales 91, 95 and 119, I urge the subcommittee to give careful review to the possible ramifications for California of retracting the distance established by the Proclamation. Reducing the territorial from 12 to 3 miles, as proposed by HR 1405, would weaken California's coastal management program. The California Coastal Commission is charged with the unique state authority for reviewing federal activities beyond the state's ocean waters when these actions influence the resources of the coastal zone, granted by the Federal Coastal Zone Management Act (CZMA).

This essentially provides "federal consistency" review authority to the Commission where activities must be in accordance with the California Coastal Act. The coastal zone included in this authority is synonymous, under CZMA, to the "territorial sea". When Proclamation 5928 was signed by the President, it also had the effect of extending the coastal zone from 3 to 12 miles, for the purposes of "federal consistency review" by the Coastal Commission.

In an opinion issued by the California State Attorney General, John Van de Kamp, he concludes that the Proclamation would not extend the boundaries of state ownership or the state's permit authority, but that it would extend the coastal zone under the CZMA relative to federal consistency review provisions.

The California coast has provided fertile ground for federal activities, including disposal of dredged material, energy development, incineration of toxic wastes, to name but a few. These activities are expected to increase in the future, resulting in significant impacts on the environmental quality of the coast. There have been many discussions concerning the impacts of federal activities outside the former 3-mile limit that had a direct impact on the territory within that limit. There are examples of dredged materials discarded beyond the 3-mile limit that, because of wave action and dispersement, migrated to areas within the limit. By extending this area to 12 miles, many of these questions will be more clearly delineated for this coastal territory.

The provision for federal consistency review by the California Coastal Commission was intended for the very purpose of strengthening the state's role in addressing federal activities with potential adverse impacts on the coastal zone. California has been a strong advocate of responsible management of the coastal zone. Its important role should not be diminished when it has been an effective guardian of coastal resources and a fair partner with federal agencies in carrying out its duties under the Federal Coastal Zone Management Act.